Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

U-HAUL CO. OF CALIFORNIA,

Petitioner,

v.

CITY OF BERKELEY, CITY COUNCIL OF THE CITY OF BERKELEY, LINDA MAIO, DARRYL MOORE, MAXWELL ANDERSON, DONA SPRING, BETTY OLDS, KRISS WORTHINGTON, AND GORDON WOZNIAK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a governmental body must meet the substantive due process standard of review, articulated in *Lawton v. Steele*, 152 U.S. 133 (1894), when, pursuant to its police power, it revokes a use permit under which a business has a vested property right.

2. Whether substantive due process review requires a consideration of the imposition of less drastic remedies in a case of permit revocation.

CORPORATE DISCLOSURE STATEMENT

Petitioner U-Haul Co. of California discloses that the following publicly held companies own 10% or more of U-Haul's shares: Amerco.

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U-Haul Co. of California respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Three.

OPINION BELOW

The decision of the California Court of Appeal is not officially reported but is available at 2009 WL 804150 and is reproduced in Appendix A at 1a – 25a.

JURISDICTION

The judgment of the California Court of Appeal was issued on March 27, 2009. Appendix A. U-Haul's timely Petition for Review with the Supreme Court of the State of California was denied on June 10, 2009. Appendix E. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV of the United States Constitution, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case arose when the City of Berkeley deprived Petitioner U-Haul Co. of California of its property, namely the conditional use permit under which U-Haul has operated in the City for over thirty years. The City – and, subsequently, the California courts – improperly refused to consider whether a less drastic remedy was available.

The revocation of a land use permit – an act that has the severe effect of putting the licensee out of business – is an exercise of the police power that is subject to the protections of substantive due process. Pursuant to *Lawton v. Steele*, 152 U.S. 133 (1894) and its progeny, substantive due process requires that a government agency refrain from revoking a use permit if it is feasible for the agency to employ a less restrictive remedy that achieves the same goals.

The law concerning the application of substantive due process to land use contexts is conflicted and in need of resolution and guidance from this Court. "The Supreme Court has not provided firm and coherent guidance to lower courts confronted with these issues and, therefore, essentially has forced circuit and district courts to develop their own approaches to substantive due process claims." David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 Ga.L.Rev. 769, 770 (1995). Therefore, U-Haul respectfully requests that this Court intervene in this matter and grant this Petition for Certiorari.

U-Haul Co. of California is a California corporation that operated a truck-sharing facility in the City of Berkeley from prior to 1975, when the City issued the company a conditional use permit (Administrative Record ("AR") 36-38), until 2008, when the City revoked its use permit. From the business' inception, U-Haul operated the facility for over twenty years without significant incident or complaint.

In 2004, the City sent U-Haul a Notice of Violation regarding the parking of trucks on the street. (AR 56.) In 2006 and 2007, the City, in response to purported "aggressive complaints," began a survey and investigation of U-Haul (AR 137), including weekly inspections of the facility from May 2006 to June 2006. (AR 399.) U-Haul met with the City in August 2006 and confirmed its steps to improve the facility and meet with community members. (AR 58.)

In 2006 and 2007, at the direction of City staff, U-Haul applied for a use permit modification to increase the number of trucks allowed, decrease the number of trailers allowed, and to include spaces for overflow trucks. (AR 10-11, 66-68, 72-77) At the same time, U-Haul appealed several of the citations, arguing that parking vehicles on the street did not constitute a modification of the use permit, and that the increased use of trucks did not intensify the use of the property beyond that permitted by the use permit because U-Haul had reduced its number of trailers. As the use permit stated that the company would be using "*Approximately* 20 Rental Trucks and 30 Rental Trailers" [emphasis added], U-Haul had kept under 50 total vehicles on the lot. (AR 88-92.)

During the appeal process, the City conceded that customers were allowed to "park their rented trucks on the street when they return them" – provided U-Haul promptly retrieved them. (AR 95.) Further, the City's Administrative Hearing Officer dismissed a large fine for excessive trucks on the facility lot, finding that the permit condition regarding the maximum amount of vehicles on the lot was "not sufficiently detailed, consistent, or unambiguously articulated" and that there was a "fundamental flaw in the City-mandated numerical limit." (AR 100.)

The City Zoning Adjustments Board ("ZAB") commissioned a staff report regarding U-Haul's business operations and subsequently conducted a hearing in June 2007 regarding U-Haul's use permit. The ZAB staff report advised the ZAB to recommend that the City Council determine what conditions were applicable to the use permit, that U-Haul had violated the use permit, and that specific additional conditions be imposed on the use permit.[1] (AR 14-15).

At the hearing, however, the ZAB raised the possibility of revoking U-Haul's use permit – a remedy that was not part of the staff report's recommendations. One ZAB member noted concern at the possibility of

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1. These specific recommendations included conditions such as (1) not allowing one-way rentals to be returned to the Berkeley facility, (2) requiring U-Haul's attendance at bi-monthly neighborhood meetings, and (3) removing the term "approximately" from the maximum vehicle count, among others. (AR 14-15).

taking such a drastic step based on alleged violations of unclear language in the use permit:

> "And so here we are saying that we're going to revoke their use permit because they're in violation of their use permit, yet our own hearing officer says the use permit isn't clear. That concerns me a little bit. It seems we would want to clarify the use permit, and then revoke it."

(AR 146). Nevertheless, a ZAB member moved to go beyond the staff recommendation and recommended revoking the use permit. (AR 139.) Ultimately, the ZAB resolved to recommend that the City Council revoke U-Haul's use permit. (Appendix C at 30a-31a.)

The City Council held a public hearing on the issue in September 2007. (AR tabs 6, 14.) At the hearing, the City's Code Enforcement Supervisor admitted to submitting a one-sided report to the Council that contained only the evidence supporting the ZAB's recommendation. (AR 163). U-Haul also submitted papers and testified at the hearing. (AR tab 13.) U-Haul submitted written testimonials from businesses and individuals noting that U-Haul had substantially corrected all problems. (AR 395-398.) Though U-Haul admitted to certain issues regarding internal company communications, it also showed compliance with City requests (AR tab 13) and communication with neighbors (AR 402-403).

Additionally, though U-Haul's counsel proposed less drastic measures similar to those recommended by City staff, *i.e.*, that the City impose strict enforceable conditions on the use permit instead of revoking it (AR 509-510), the City Council voted to revoke the use permit (AR 406-407), and later formally adopted a resolution to revoke the permit. (Appendix D at 32a-47a.)

U-Haul filed a complaint and petition for writ of mandate against the City and related persons in Alameda Superior Court in October 2007. (Clerk's Transcript ("CT") 1-10.) U-Haul submitted its memorandum of points and authorities in support of the petition in December 2007, in which it raised the issue presented here, arguing among other things that the revocation was a deprivation of a vested right in the permit based on U-Haul's 30-year reliance on the permit. U-Haul argued that the City's actions constituted "interference with the constitutional right to carry on a lawful business" in violation of the *Lawton* substantive due process test as articulated in *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376 (1994) (CT 169-170).[2]

U-Haul reiterated the substantive due process issue in its reply brief to the trial court in support of the writ petition, this time further emphasizing the constitutional

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2. The precise language of the *Korean American* articulation of the *Lawton* test is as follows: "In order to justify the interference with the constitutional right to carry on a lawful business it must be clear the public interests require such interference and that the means employed are reasonably necessary to accomplish the purpose and are not unduly oppressive on individuals." 23 Cal.App.4th at 391, fn. 5.

nature of the issue and the "unduly oppressive" prong of the *Lawton* test. (CT 169). In its order denying the petition, however, the court did not address U-Haul's constitutional contentions whatsoever (Appendix B at 26a-28a).

In June 2008, U-Haul filed a notice of appeal of the denial of the writ petition. (CT 484-485.) In its opening brief, U-Haul again asserted that the permit revocation violated its constitutional rights because "(1) it terminates a vested property right, (2) the City had less oppressive remedies available, and (3) the revocation was in excess of the findings." (Appeal Opening Brief at 23). The brief continued by again citing to the *Korean American* articulation of the *Lawton* test. *Id.* Later, in its reply brief, U-Haul argued against the City's contention that the *Lawton* test did not apply to revocations based on alleged violations of permit conditions, citing *Korean American* for the proposition that

> "it is clear revocation of a use permit could have the effect of putting the licensee completely out of business. It is consequently a very harsh remedy which requires the strictest adherence to principles of due process. Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible."

23 Cal.App.4th at 390, fn. 5. (Appeal Reply Brief at 14).

The appeal was heard by the Court in March 2009, and the Court of Appeal affirmed the trial court's denial of the writ petition. The Court of Appeal drew a distinction between a permit that is revoked for alleged operation of a nuisance and one that is revoked for alleged violations of the terms and conditions of the permit. Specifically, the Court of Appeal held that while businesses whose activities constitute a nuisance are afforded the due process inquiry articulated in *Lawton* and *Korean American*, businesses that allegedly violate permit conditions are not:

> "the three requirements [under the *Lawton* test] – that the public interest require [*sic*] municipal interference, that the means employed are reasonably necessary to accomplish the purpose, and that the means employed are not unduly oppressive – related to the second ground (the existence of a compelling public necessity) rather than the first ground (the failure to comply with the permit's reasonable terms or conditions)."

Appendix A at 17a-18a. It is unreasonable and inequitable, however, that "conditions violators" would simply be cut out of the otherwise relatively expansive breadth of substantive due process in land use matters, without any indication of the constitutional basis for the omission.[3]

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3. As U-Haul argued to the California Supreme Court, such a rule essentially allows the perverse result that a permittee who is a nuisance-maker will receive more legal protection that

(Cont'd)

U-Haul petitioned the California Supreme Court for review in May 2009. In its petition, U-Haul argued that the Court of Appeal's distinction between permit conditions violators and those whose activities constitute a nuisance not only failed to meet the *Korean American* requirement of "[strict] adherence to principles of due process," including the imposition of alternate remedies whenever possible, it also failed to adhere to the broad brush of the *Lawton* factors, which are required whenever "the state [interposes] its authority in behalf of the public." *Lawton*, 152 U.S. at 137. The California Supreme Court, however, denied review, and U-Haul now respectfully requests this Court to intervene regarding this important constitutional question.

REASONS FOR GRANTING THE PETITION

I. The Substantive Due Process Standard Articulated in *Lawton v. Steele* Applies to All Exercises of the Police Power, Including Revocations of Use Permits

This Court and many others have long interpreted the Fourteenth Amendment to provide substantive due process protections for government intervention into and regulation of private property rights: "[The

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a permittee who has violated benign but reasonable terms of its permit. This will, in turn, encourage government agencies to do what the City has done – bootstrap code sections onto permit conditions and thusly avoid substantive due process considerations. Such a loophole in the exercise of the police power flouts constitutional notions of justice and endangers private property rights.

Fourteenth Amendment] has been read broadly to extend protection to any significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

The police power, a core vehicle for government intervention into private property rights, is subject to these substantive due process protections. The seminal decision in *Lawton v. Steele*, 152 U.S. 133 (1894) defines the limits of the police power by imposing a restrictive substantive due process test on the entire exercise of the power, which "is universally conceded to include everything essential to the public safety, health, and morals . . . the state may interfere wherever the public interests demand it." 152 U.S. at 136. The test provides that

> "to justify the state in . . . interposing its authority on behalf of the public, it must appear – First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

152 U.S. at 137.[4]

4. See also *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) ("[The police power] must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.").

As the language of the *Lawton* decision specifically includes *all* cases where the government interposes its authority on behalf of the public, the *Lawton* three-prong test was intended to apply to a wide range of government regulation.[5] This principle remains valid and has been reiterated by courts on many occasions. *See Presbytery of Seattle v. King County*, 114 Wash.2d 320, 330 (1990) (referring to the *Lawton* test, which measures "whether the police power . . . has exceeded its constitutional limits," as the "classic" due process test); *see also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-595 (1962) ("The classic statement of the rule in *Lawton v. Steele* [regarding "public encroachment upon private interests"] . . . is still valid today.").

It has also been repeatedly held that both the imposition of conditions on private land uses and the revocation of such permits are exercises of the police power. *See O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151, 158 (1971) ("Legislation requiring that a permit be issued by a municipality as a condition precedent to the erection of a structure on property privately owner, or to the use that may be made of such property, if reasonable, is a valid exercise of the police power."); *see also Rith Energy, Inc. v. U.S.*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) ("[T]he revocation of the

5. This seems fundamentally fair: substantive due process *should* provide a check against overly oppressive government actions. This is especially true in a property context, as the Framers viewed private property protections as paramount in a free society, a view which continues today: "there is no greater expression of freedom and liberty than in defense of the God-given right of an individual to hold, possess, and use private property." H.J. Res. 94, 110th Cong. (2008).

permit . . . was an exercise of the police power directed at protecting the safety, health, and welfare of the communities . . .").

Further, in the present matter, the harm that the City sought to remedy through its regulation of U-Haul's business consisted of negative parking and traffic impacts on the neighborhood surrounding U-Haul's business. "Parking, traffic, and visual impact were problems expressed by some of the neighbors, [and they clearly] represent concerns that fall well within the domain of public interest and welfare." *Guinnane v. San Francisco City Planning Comm'n*, 209 Cal.App.3d 64, 76 (1972). Therefore, as the government action at issue is the City's revocation of U-Haul's use permit based on alleged violations of permit conditions that the City itself imposed, and as the City acted on behalf of the public interest in attempting to ameliorate parking and traffic conditions, the action is an exercise of the City's police power and should be subject to the *Lawton* analysis. The lower courts, however, either ignored or expressly declined to apply the test.[6]

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6. The Court of Appeal did hold, however, that the *Lawton* test still applies in permit revocations based on nuisance grounds – indicating the ongoing vitality of the balancing analysis. As stated above, U-Haul disputes the Court of Appeal's contention that permit revocations based on purported conditions violations (as opposed to revocations based on nuisance grounds) are not government actions that are subject to due process and the *Lawton* balancing analysis.

II. Substantive Due Process Requires a Weighing of the Burdens on the Property Owner Against the Benefits of Exercising the Police Power

As *Lawton* indicates, the benefits the state seeks to achieve through an exercise of the police power must be weighed against the impact of the regulation on the private landowner: "Generally, in the valid exercise of the police power are included all things essential to the conservation of the public safety, public health, and public morals. But this sweeping general rule is modified by a consideration of the rights of the private individual." *U.S. v. Cohen*, 268 F. 420, 423 (E.D.Mo. 1920).[7] The hallmark of the *Lawton* test, then, is its provision that that governmental regulation be proportional to the goal it seeks to achieve. As stated in a recent decision that explores the *Lawton* test in depth, *Presbytery of Seattle v. King County*, 114 Wash.2d 320 (1990), "the third inquiry [whether the regulation is unduly oppressive on the landowner] will usually be the . . . determinative one." *Id.* at 331.

For example, in *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376

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7. See also *City and County of San Francisco v. Market Street Railway Co.*, 98 F.2d 628, 632 (C.A.9 1938) ("The means employed must have a real and substantial relation to, and must have some fair tendency to accomplish or aid in the accomplishment of the ends sought. On the other hand, if the means chosen are arbitrary and unreasonable, capricious, *or beyond the necessities of the case*, then the Fourteenth Amendment is violated, and it is the duty of the federal courts to declare the statute, ordinance, order or regulation void." [emphasis added]).

(1994), a California appellate decision which involved the revocation of a liquor store's use permit, the court held that "in order to justify the interference with the constitutional right to carry on a lawful business it must be clear the public interests require such interference and that the means employed are reasonably necessary to accomplish the purpose and are not unduly oppressive on individuals." *Id* at 391, fn. 5, citing *Lawton*.[8] The *Korean American* court went on to state, crucially, that

> "it is clear revocation of a use permit could have the effect of putting the licensee completely out of business. *It is consequently a very harsh remedy which requires the strictest adherence to principles of due process. Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible.*"

Id (emphasis added).

With respect to the necessity of weighing a government action against the property right it impedes (typified by the burdensome action of permit revocation), an apt analog may be found within the recent decisions of this Court. In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the Court addressed the historic confusion regarding the distinction between takings claims and substantive due process claims, a confusion which had been perpetuated in part by *Agins*

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8. See also *O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151, 159 (1971).

v. City of Tiburon, 447 U.S. 255 (1980), which referred to the "substantially advances" test in connection with takings doctrine. The *Lingle* Court, in rejecting this test, expressly incorporated the "magnitude or character of the burden a particular regulation imposes upon private property rights" into the takings analysis. 544 U.S. at 542.

In this way, *Lingle* – like *Lawton* and *Korean American* – recognizes that when a government regulation has a substantial adverse impact on a private landowner, a measure of balancing must occur:

> "The 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose ... the 'substantially advances' inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. [T]his test does not help to identify those regulations whose effects are functionally comparable to government ... invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."

Id.

U-Haul, recognizing that the doctrines are distinct, does not here attempt to conflate takings claims and substantive due process claims. Rather, takings claims provide a useful example of this Court's approach to a clear invasion of a property right. If weighing the burden to the property owner is necessary in a takings context – as *Lingle* holds – then it is also necessary in a substantive due process claim, at least where, as here, the invasion of a property right is just as severe.

III. Lower Courts Have Applied Multiple Conflicting, Vague, and Inappropriate Tests in Assessing Substantive Due Process Issues

While the *Lawton* standard is equitable, broadly applicable, and clear – evidenced by its continued use for over 100 years – some courts have gone astray from the balancing test that is so necessary to provide real protection for the individual from abusive and disproportionate government regulation. In substantive due process cases involving land use matters, other various standards of review have cropped up, including the "shocks the conscience" test,[9] the "substantially advances" test, and the "conceivable rational relationship" test.[10] None of these tests is altogether clear, and, as explained below, none of these tests – at least in the severe context of a use permit revocation – properly measures whether the burden to the landowner is commensurate with the goal the government regulation purports to achieve.

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9. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

10. See *Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991).

Due in part to these myriad tests, academics and legal commentators have frequently noted that the unsettled standard of substantive due process review in land use matters has resulted in confusion. *See* Morton Gitelman et al., *Land Use: Cases and Materials*, 997 (6th ed. 2003) ("Attorneys . . . are often frustrated in pursuing substantive due process claims because of the unsettled question of what standard to apply."). *See also* Brian Blaesser & Alan Weinstein, *Federal Land Use Law and Litigation*, §1:13 (2005 ed.) ("The Supreme Court has not given clear direction on how to apply substantive due process in land use cases, so lower federal courts are divided on what substantive due process means.").

The case law reflects this discord. In *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), the Sixth Circuit undertook to "collate the law" and "catalogue the various approaches" of the various federal circuits in zoning-related substantive due process cases. *Id.* at 1214. The court discovered a "remarkable lack of uniformity," stating that "we wish it were in our power to harmonize [the conflicting federal decisions regarding substantive due process and zoning], but the conflicts among the circuits are too great. Harmony will have to await action by the Supreme Court." *Id.* at 1220, fn. 45.

Per *Pearson*, the First Circuit, for example, inquires not into the actual motive for the government action, but rather whether there is any "conceivable rational relationship" between the government action and "legitimate government ends." *Id* at 1217 [citations omitted]. The Second Circuit is described as "hostile to

federal zoning plaintiffs," reigning in the scope of protected property rights that give rise to a viable substantive due process claim in the first place. *Id.* at 1217-1218. The Sixth Circuit has used both the "arbitrary and capricious" test and the "shocks the conscience" test. *Id.* at 1218. The Seventh Circuit, on the other hand, has imposed an "invidious or irrational" test. *Id.* at 1219. The Eighth Circuit, according to *Pearson*, considers the question of whether a substantive due process claim may arise from denial of a zoning permit to be an open one. *Id.*

Not only are the circuits in conflict regarding what test to apply in a substantive due process claim, they are also in conflict regarding the characterization of a subject government action as legislative (which, according to *Pearson*, generally entitles the government to a more deferential standard of review) or as administrative (which generally requires more government scrutiny):

> "[The various circuits'] precedents are not harmonious. Some consider all zoning decisions legislative, subject to only the most limited scope of review. Some state a general view for irrationality, without differentiating between legislative or administrative actions. Some classify decisions by the local legislative body as legislative while denominating actions by administrative boards, such as the board of adjustments, as administrative. Even this is not a hard and fast rule . . . this circuit has stated that the legislative/administrative distinction is of little utility, holding that when

> a relatively small number of persons are affected on individual grounds, the action is considered administrative ... it has also been said that the difference is between prospective, legislative-type rules and enforcement."

Pearson, 961 F.2d at 1220 (citations and quotations omitted).[11]

These multiple standards fail to protect the property owner's constitutional right to substantive due process. First, they are largely undefined and therefore subjective – for example, what does it mean to "shock the conscience"? Further, and most crucially, many of the tests applied – including the analysis done by the California Court of Appeal here – fail to adequately consider an essential part of the due process analysis, i.e. the impact on the landowner. As *Lawton* and its progeny make clear, substantive due process requires a proportionality between the government action and the invaded property right.

The nation's courts should not continue to pick and choose among vague, inappropriate tests in the

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11. This distinction is important because most of the cases cited in *Pearson* involved "legislative" government actions, which dealt with denials of variances, permits, or site plans – *prospective* situations. The current matter, however, deals with *enforcement*, which involved significant fact-finding and the revocation of an already-vested property right. U-Haul contends that the *Lawton* weighing analysis is especially important in the context of these "corrective," individualized government actions.

important arena of constitutional rights. Indeed, "misunderstandings about the concept of substantive due process and its underlying aims exacerbate the problem [posed by the multiplicity of standards]. Often, this confusion results in an inadequate remedy for victims of wrongful government action." David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 Ga.L.Rev. 769, 770 (1995).

IV. The Weighing of Benefits and Burdens Must Include an Evaluation of Any Less Drastic Available Remedies

Any comparison of the benefits and the burdens of a particular exercise of state power must take into account the availability of less drastic remedies. If the state can achieve the alleged benefits it seeks by alternate means that do *not* impose a severe burden on a property owner, then it must do so; otherwise, the state is imposing the more severe burden with no countervailing benefit, which is plainly a violation of substantive due process. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962) ("To evaluate [a land use ordinance's] reasonableness we therefore need to know such things as the nature of the menace against which it will protect, *the availability and effectiveness of less drastic protective steps*, and the loss which appellants will suffer from the imposition of the ordinance.") [emphasis added].

Lower courts have similarly recognized the importance of considering less drastic alternative remedies specifically in the context of land use decisions.

See Korean American, 23 Cal.App.4th at 390 fn. 5 ("Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible.").

Presbytery of Seattle v. King County, 114 Wash.2d 320 (1990) provides an excellent model of how to engage in the *Lawton* analysis. In *Presbytery*, a land use case, the Washington Supreme Court cited the "classic" *Lawton* doctrine and posited several factors to assist with the inquiry into the "unduly oppressive" prong of the *Lawton* due process test – the prong that assesses the appropriateness of the burden imposed on the individual:

> "The 'unduly oppressive' inquiry ... implies a balancing of the public's interest against those of the regulated landowner. We have suggested several factors ... to consider ... whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic measures; and the economic loss suffered by the property owner."

114 Wash.2d at 331.[12]

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12. *Presbytery* also held that the "two constitutional theories [takings and substantive due process] are *alternatives* in cases where overly severe land use regulations are alleged." The court identified two pertinent differences between takings and due process claims – the remedy sought (compensation

(Cont'd)

Finally, this Court similarly stressed the need to consider less drastic remedies in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), when it reversed a punitive damages award on substantive due process grounds:

> "The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."

Id. at 584.

Thus, the City of Berkeley (and the California courts reviewing its decision) was obliged to consider whether a less drastic sanction than permit revocation – essentially the "death penalty" for a business – would accomplish the City's professed goals. As shown below, the City failed to do so.

V. Here, the City's and the Lower Courts' Failure to Consider the Burdens on U-Haul Resulted in a Violation of U-Haul's Substantive Due Process Rights

In the instant case, U-Haul, by its 30 years of reliance on its use permit, had a vested right in the permit which entitled it to constitutional protection.

(Cont'd)

versus invalidation) and the effect on the public (conferral of benefit versus protection from harm). Thus, this further demonstrates that, while takings and substantive due process are distinct claims, there are circumstances where a regulation is so severe that a similar weighing analysis must be employed.

See Kerley Industries, Inc. v. Pima County 785 F.2d 1444, 1446 (9th Cir. 1986) (A conditional use permit creates a property right which may not be revoked without constitutional rights of due process). In its revocation efforts, however, the City did not pursue alternate remedies, even though (1) the staff report commissioned by the City's Zoning Adjustment Board recommended specific additional conditions to be imposed on the use permit (such as not allowing one-way rentals to be returned to the Berkeley facility, requiring attendance at bi-monthly neighborhood meetings, and removing the term "approximately" from the maximum vehicle count) (AR 14-15), (2) the Zoning Adjustment Board members themselves expressed concern that the permit conditions were unclear (AR at 146), and (3) U-Haul's counsel also proposed the imposition of new, strict conditions on business operations at a meeting of the City Council (AR 509-510).

The record thus shows that it was certainly feasible for the City to adopt a less draconian remedy than total revocation of the permit – clarification of the permit, for example, or imposition of new conditions, or an order temporarily suspending U-Haul's business until the perceived problems were corrected. Indeed, as no meaningful discussion occurred regarding the proposed additional conditions, the City demonstrated no evidence that any of these alternate remedies would be ineffective or unfeasible.

To apply a "conceivable rational relationship" or a "substantially advances" test to the City's decision essentially gives the City (and, by extension, any other

government body) carte blanche to choose the most radical and severe regulation simply because it effectuates this goal – it allows a sledgehammer where a scalpel is needed. As a result, these tests provide very little of the "strictest adherence to principles of due process" that *Korean American* requires, largely ignore the landowner's valuable vested property right, and allow for regulations that are "unduly oppressive on individuals," which *Lawton* forbids.

Applying the *Presbytery* factors, articulated above, to the present matter further shows that the revocation of U-Haul's use permit *is* unduly oppressive. First, the harm sought to be remedied is an alleged overabundance of moving trucks at and around a business, which does not represent a grave or otherwise permanent threat to the community welfare. Second, as explained above, City staff themselves indicated the availability and effectiveness of less drastic measures by proposing to clarify the permit conditions and to impose specific additional conditions on the use permit.[13] Even a temporary suspension of business operations pending resolution of the overabundance of trucks would be significantly less drastic and equally as effective. Third, it is clear that the economic loss suffered by U-Haul is great – a complete closure of its truck business. As U-Haul testified, the facility served approximately 12,000 local residents per year. (AR 382.)

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13. Indeed, the gravity of the revocation remedy is all the more pronounced considering the City's own Administrative Hearing Officer, after presentation of evidence and argument from both sides, found that the vehicle limit condition itself was vague and unenforceable. (AR 100.)

Weighing these factors together, it is clear that the burden of revocation to the U-Haul is unduly oppressive given the availability of other, less severe – yet feasible – solutions.

CONCLUSION

As shown above, the City of Berkeley and the lower courts violated U-Haul's substantive due process rights in revoking U-Haul's use permit without adequately considering less drastic remedies that were available.

The issue presented by this case, however, reaches beyond one particular land use decision. As the Sixth Circuit noted in *Pearson*, the confused state of affairs brought about by the conflicting standards applied by the various federal and state courts to substantive due process claims "awaits action" by this Court.

Accordingly, this Court should grant certiorari and resolve the questions presented, to ensure uniformity of decision in this important and growing area of law.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE FILED MARCH 27, 2009

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION THREE

No. A121811

U-HAUL COMPANY OF CALIFORNIA,

Plaintiff and Appellant,

v.

CITY OF BERKELEY et al.,

Defendants and Respondents.

(Alameda County Super. Ct. No. RG07-0352204)

This is an appeal from a judgment by the trial court denying appellant U-Haul Company of California's petition for writ of mandate (the writ petition). Appellant's unsuccessful writ petition challenged a decision by respondents City of Berkeley and the Berkeley City Council (collectively, the City) to revoke a use permit the company was granted in 1975 to operate a truck and trailer rental business.[1] Appellant seeks

1. The individual members of the Berkeley City Council are also named as respondents in this appeal.

reversal of the judgment on the grounds that the evidence was insufficient to support the trial court's decision to uphold revocation of the use permit, and that its due process rights were violated during the revocation process. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 1975, appellant submitted a use permit application requesting the right to operate a U-Haul facility for renting trucks and trailers at the property located at 2100 San Pablo in the City of Berkeley. The property, less than three miles from the University of California's Berkeley campus, was in an area zoned as a limited commercial district abutting a residential district. The use permit application proposed the following use: "To conduct a U-Haul Moving Center-Renting of U-Haul Trucks, Trailers, furniture pads, hand trucks, etc. Sale and installation of permanent frame hitches. Approximately 20 Rental Trucks and 30 Rental Trailers. Two full-time and two part-time employees—open from 8:00 a.m. to 7:00 p .m."

On July 15, 1975, the City issued the use permit to appellant. The use permit set forth several general conditions, including that "the plans submitted with the application shall be followed and that all of the assurances and commitments contained in the original application shall be met except as they may be modified by the special conditions listed below." Relevant here, the use permit set forth as a special condition that "the use permit shall be subject to review, attaching of

additional conditions, or revocation if persistent complaints are received that the operation is detrimental to the neighborhood."

Not long after the City issued the use permit to appellant, tension arose between appellant and its neighbors, particularly due to the parking of appellant's trucks on streets adjacent to the property. Eventually, in 1996, complaints regarding appellant's use of neighborhood streets for parking its vehicles came to the City's attention, leading it to issue a First Notice and Order to Correct to appellant. Such notice, among other things, warned appellant that all uses granted pursuant to the permit were "ON THE PROPERTY ONLY," and that violations of said restriction could lead to review and revocation of the permit.

In response to the notice, appellant advised in October 1997 that it would "attempt to reduce the inflow of equipment" by, among other things, opening a new facility in a nearby city with more parking, placing a premium on outgoing rates to Berkeley from other facilities, and insisting that customers renting at the Berkeley facility return the vehicles elsewhere. It is unclear whether such corrective steps were actually implemented, however, it does appear that complaints from the neighbors "sort of subsided" around this time period.

In June 2000, the City again issued a warning to appellant regarding its improper use of adjacent streets for parking its vehicles after receiving complaints from

neighbors. When the violations continued, the City issued a criminal citation to appellant, which again promised to take corrective steps to address the complaints, including applying for a variance to the use permit to increase the number of trucks and decrease the number of trailers permitted on the property. There is no evidence, however, that appellant applied for such a variance at that time.

Again in 2004, the City received complaints regarding appellant's violations of its use permit by parking trucks on the public right of way, and thus issued a Notice of Violation on September 15, 2004.

In 2006, the City initiated weekly investigations of appellant following its receipt of "aggressive complaints" regarding the company's violations of the use permit. The City's investigation revealed that appellant was consistently parking as many as 30 of its vehicles on neighborhood streets adjacent to its property (sometimes blocking cross walks or fire hydrants), and that it consistently had between 40 to 50 trucks on its property in violation of the permit's 20-truck restriction. The City thus began to issue citations for the violations, which totaled $52,900 as of September 18, 2007.

In August 2006, appellant met with the City to discuss its proposed corrective steps for addressing the violations of its use permit. Following the meeting, the City agreed to a 30-day moratorium on its enforcement of the use permit, conditioned on appellant taking certain actions, including applying for modification of the

permit, meeting with neighbors, reducing the number of trucks on the property to 20, and refraining from parking its vehicles on adjacent streets. However, after warning appellant that the moratorium was set to expire in two days and that the corrective steps were not yet implemented, the City resumed issuing citations.

In November 2006, appellant applied for a use permit modification to increase the number of trucks and decrease the number of trailers permitted on the property. However, appellant twice failed to comply with the City's requirements for applying for such a modification, and its submission was ultimately rejected.

During this time, the City continued to observe and to receive complaints of appellant's violations of the use permit. Between August 2006 and June 2007, the City had notice of at least 24 incidents of appellant's use of adjacent streets for parking its vehicles. On four occasions, the City counted between 29 and 39 trucks parked on the streets. As such, the City's staff asked the Zoning Adjustments Board (ZAB) to address appellant's violations of the use permit, as well as possible remedies under the Berkeley Municipal Code (BMC), such as modification or revocation of the use permit. (BMC, § 23B.60.020.)

On June 28, 2007, ZAB held a hearing in the matter, receiving both oral and written testimony from individuals who included appellant's neighbors and the City's staff. Appellant did not appear or submit a response to the alleged violations and, following the

hearing, ZAB recommended that the City Council revoke the company's use permit.

On September 18, 2007, the City Council held a public hearing on the matter, at which it considered the administrative record and received testimony from, among others, appellant's district vice-president, Jeremy Frank, the City's supervisor of code enforcement, Gregory Daniels, and several of appellant's neighbors. During his testimony, Frank acknowledged and apologized for appellant's repeated violations of its use permit, and for its failure to implement steps to correct them in a timely fashion. Following the hearing, the City Council voted unanimously to revoke the use permit, finding that appellant's "apology at the September 18, 2007 public hearing does not negate its serious violations of Use Permit No. 7575 and is insufficient in light of the evidence which shows [appellant's] longstanding failure to comply with the use permit."

On October 19, 2007, appellant filed a complaint and petition for writ of mandate (the writ petition) against the City. The complaint contained causes of action for injunctive relief, declaratory relief and inverse condemnation.

On January 31, 2008, the trial court issued a tentative order denying the writ petition, which appellant failed to contest in a timely manner. Nonetheless, the next day, appellant appeared in court to challenge the order. The trial court declined to hear

appellant's challenge on the ground that the company failed to give formal notice of an intent to appear in accordance with California Rules of Court, rule 3.1308(a)(1). Accordingly, on February 7, 2008, the trial court adopted its tentative order denying the writ petition and entered judgment against appellant.

On February 8, 2008, appellant sought a stay of the judgment for 60 days to consider its options on appeal, which the trial court granted. Thereafter, on May 21, 2008, appellant filed for voluntary dismissal of the remaining causes of action for injunctive relief, declaratory relief and inverse condemnation. This appeal of the judgment denying appellant's writ petition followed.

DISCUSSION

On appeal, appellant challenges the trial court's denial of its writ petition. Appellant reasons that its due process rights were violated during the revocation process, that revocation of the use permit was unwarranted based upon the record as a whole, and that substantial evidence failed to support any of the factual findings that the trial court relied upon in affirming the revocation. We address each contention in turn.[2]

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2. In its responding brief, the City asks that we dismiss the appeal as untimely and for lack of jurisdiction. This court, however, has already ruled on the City's motion for dismissal of the appeal, which was denied on July 18, 2008. As such, we decline to revisit the issue.

Appendix A

I. Standard of Review.

In reviewing a decision of an administrative agency, the trial court exercises its independent judgment on the evidence presented in the administrative hearing and determines whether the weight of the evidence supports the agency's decision. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 369-370.) In doing so, the trial court must employ a "strong presumption of correctness" to the agency's findings. (*Fukuda, supra,* 20 Cal.4th at p. 817.) Further, the party challenging the agency's decision—in this case, appellant—bears the burden of proving that such findings were against the weight of the evidence. (*Ibid.*; see also *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1077-1078 [*Breslin*] ["In the trial court, [appellants] had the burden of proof to show that the [agency's] decision was not supported by the weight of the evidence—that is, that the decision was not supported by the preponderance of the evidence."].)

In applying the independent judgment test, "[t]he findings of a board where formal hearings are held should and do come before the [trial] court [ ] with a strong presumption in their favor based primarily on the [rebuttable] presumption contained in section 1963, subsection 15, of the Code of Civil Procedure [currently Evidence Code section 664] 'That official duty has been regularly performed.' Obviously, considerable weight should be given to the findings of experienced

administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence." (*Fukuda, supra,* 20 Cal.4th at p. 812; see also *Mason v. Office of Admin. Hearings* (2001) 89 Cal.App.4th 1119, 1131.)

On appeal, we must determine whether the trial court's judgment is supported by substantial evidence. (*Fukuda, supra,* 20 Cal.4th at p. 824; see also *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72-73 ["the question before this court turns upon whether the evidence reveals substantial support, contradicted or uncontradicted, for the trial court's conclusion that the weight of the evidence does not [support the agency's findings]"].) We thus must uphold the trial court's factual findings unless they "so lack evidentiary support that they are unreasonable. . . . [Citation.]" (*Breslin, supra,* 146 Cal.App.4th at p. 1078; see also *City of Rancho Cucamonga v. Regional Water Quality Control Bd .* (2006) 135 Cal.App.4th 1377, 1387.)

II. Did Appellant Receive Due Process?

Applying the standard of review set forth above, we first address appellant's claim that it did not receive due process from the City or the trial court during the proceedings to revoke its use permit.

With respect to the proceedings before the local agency, appellant suggests for the first time on appeal that the "factual circumstances [of the revocation process] raised some suspicions of an agenda or bias

against [it]. . . ." In particular, appellant relies upon two circumstances to argue that the administrative tribunal was not impartial—the fact that ZAB disregarded the recommendation of its staff that the use permit be modified rather than revoked, and that the City's Mayor commented negatively on appellant's nonattendance at the ZAB hearing before the City Council voted to revoke the permit.

We conclude that, by not challenging the City's revocation decision below on due process grounds, appellant has waived the right to do so here. (*Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549 ["an issue not raised at an administrative hearing, including a claim of bias, may not be raised in later judicial proceedings"].) Moreover, even were we to disregard this waiver, we would find no violation of due process in the administrative proceedings on this record. Procedural due process in an administrative setting requires notice and the right to appear before a "reasonably impartial, noninvolved reviewer." (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219; see also *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 391 fn. 5 [*Korean American*].) Here, appellant undoubtedly had notice that the administrative agency was considering revoking its use permit. After several years of citing appellant for repeated violations of the use permit, the City issued a public notice on June 14, 2007 that a public hearing would be held before ZAB on June 28, 2007 "to consider recommendation to City Council as to whether the

U-Haul business at 2100 San Pablo Avenue is in violation of Use Permit # 7575 under BMC 23B.60.020." BMC 23B.60.020 expressly provides for a decision to "revoke or modify the permit" if certain conditions (which are discussed in great detail below) are met. Under these circumstances, we reject appellant's claim that proper notice was lacking.

We likewise reject the claim that the City's disregard of a recommendation by ZAB staff to modify the use permit or the Mayor's comment on appellant's nonattendance at the hearing rendered the revocation process fundamentally unfair. First, as appellant admits, a staff recommendation is not binding on an administrative agency, particularly where, as here, the agency provided detailed reasons on the record why such recommendation should not be followed. (Cf. *Bam, Inc. v. Board of Police Comrs.* (1992) 7 Cal.App.4th 1343, 1348-1349 [reversing the trial court's denial of a writ of mandate directing the Board to vacate an order suspending a use permit where, in so ordering, the Board rejected a staff recommendation not to revoke the permit despite the lack of any evidence supporting suspension or revocation].) Indeed, both the City Council and ZAB staff agreed in this case that appellant had violated the terms and conditions of its use permit; their only disagreement was over the appropriate remedy to order pursuant to BMC section 23B.60.020.

Second, there must be actual bias, not as here the mere suggestion of bias, to render a hearing before a disinterested tribunal unfair. (*Southern Cal.*

Underground Contractors, supra, 108 Cal.App.4th at p. 549 ["a party claiming that the decision maker was biased must show actual bias, rather than the appearance of bias, to establish a fair hearing violation"]; *ibid.* ["Bias in an administrative hearing context can never be implied, and the mere suggestion or appearance of bias is not sufficient."].) Here, the City's Mayor, like other City Council members, was justifiably concerned about appellant's failure to attend the hearing to address its alleged violations of the use permit. This concern, however, does not indicate the tribunal was actually biased against appellant, much less that it failed to provide appellant with a fair hearing on the matter.

With respect to the trial court proceedings, appellant claims that the absence of a hearing on its writ petition deprived it of due process. Referring to language in Code of Civil Procedure section 1094.5, subdivision (a) that "the case shall be heard by the court," appellant claims it had a right to such hearing. We disagree.

In declining appellant's untimely request to argue against adoption of the tentative order denying the writ petition, the trial court relied upon California Rules of Court, rule 3.1308(a)(1) (rule 3.1308(a)(1)) and Alameda County Superior Court Local Rule 3.30, subdivision (c) (local rule 3.30(c)). Rule 3.1308(a)(1), which Alameda County Superior Court has adopted pursuant to local rule 3.30(c), provides: "The court must make its tentative ruling available by telephone and also, at the option of

the court, by any other method designated by the court, by no later than 3:00 p.m. the court day before the scheduled hearing. If the court desires oral argument, the tentative ruling must so direct. The tentative ruling may also note any issues on which the court wishes the parties to provide further argument. *If the court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear.* A party must notify all other parties by telephone or in person. The court must accept notice by telephone and, at its discretion, may also designate alternative methods by which a party may notify the court of the party's intention to appear. The tentative ruling will become the ruling of the court if the court has not directed oral argument by its tentative ruling and notice of intent to appear has not been given."[3] (See also California Rules

3. Local rule 3.30(c) provides: "The court has adopted the tentative ruling procedure set out in California Rules of Court, rule 3.1308(a)(1). Prior to the hearing of a law and motion matter, a tentative ruling or indication that the parties are to appear will be issued. The tentative ruling will be available by 4:00 p.m. two court days prior to the scheduled hearing. The tentative ruling may direct the parties to appear for oral argument and may specify the issues on which the court requests the parties to provide further argument. The tentative ruling may be obtained by calling the department's tentative ruling number or by accessing the court's website. The telephone number for the department and the court's website will be provided in the Notice of Assignment. Whenever a tentative ruling has not been issued, the parties are to appear at the hearing unless otherwise ordered."

of Court, rule 3.1103(a)(2) [defining "a law and motion proceeding" to include "[an] application for an order regarding . . . writs of . . . mandate"].)

Here, pursuant to these rules, the trial court made a tentative order on the writ petition based upon the written submissions without directing the parties to appear for further argument. Appellant thereafter failed to "notif [y] all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear." (Rule 3.1308(a)(1); see also local rule 3.30(c).) As such, the trial court properly denied appellant the opportunity to argue the matter when appellant nonetheless appeared unannounced before the court the next day. Given the legal basis for the trial court's action, we cannot conclude appellant's due process rights were violated in this regard.[4]

4. In concluding that no due process violation occurred, we further reject appellant's suggestion that the trial court judge was biased against it as evidenced by the fact that "he had lived four blocks from the property and . . . had concluded that [appellant] was 'abus[ing] everybody.' " In raising this issue, appellant takes the trial court judge's statements out of context. While the judge indeed acknowledged living four blocks from the property for about 17 years, he then added "that was a long time ago . . ." The judge also stated: "I know that business has been there. But that really has very little to do with a City's decision to revoke a permit based on the activities of the business. No matter how long you've been there you still can't abuse everybody. And the standard that I used, which was the independent judgment test, resulted in the tentative ruling." Considered in the proper context, the judge's

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III. Was Revocation of the Use Permit Warranted?

We next address appellant's claim that the record, viewed as a whole, was insufficient to justify revocation of the company's 30-year-old use permit.

Citing BMC section 23B.60.020, the trial court found that the "City Council may revoke a use permit if it finds that either (1) the holder of the permit has failed to comply with one or more of the conditions set forth therein; or (2) the permitted use has been substantially expanded or changed in character beyond that set forth in the permit." The trial court then affirmed the City Council's decision to revoke appellant's permit under both prongs of BMC section 23B.60.020. In doing so, the trial court relied upon four findings of fact. First, the use permit limited appellant to "approximately 20 trucks and 30 trailers" on the property at any given time, which limit appellant exceeded by "a wide margin." Second, appellant used public rights of way for staging activities, and "failed to respond meaningfully to Respondent's unequivocal notices that the [use permit] did not permit public staging, going back to at least 1997." Third, the record reflected a pattern of persistent complaints that appellant's improper staging activities

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statements accurately reflect the law regarding permit revocation, not, as appellant suggests, actual bias. Had appellant believed otherwise, the legal recourse was to file a motion to disqualify the judge pursuant to Code of Civil Procedure section 170 .3, subdivision (c)(1), *before* entry of the judgment against it.

were detrimental to the neighborhood, which, by its terms, subjected the use permit to review, revocation or modification. And fourth, appellant had no right under the use permit to expand its operations beyond its own premises and onto adjacent property.

On appeal, appellant disputes that BMC section 23B.60.020 provides the relevant standard for deciding whether revocation of its use permit was proper. Rather, appellant argues that, "[t]o justify interference with the constitutional right to carry on a lawful business, the following must be clearly established: (1) the public's interest requires such interference; (2) the means employed are reasonably necessary to accomplish the purpose; and (3) the means employed are not unduly oppressive on individuals. *Korean Am. Legal Adv. Found. v. City of Los Angeles*, 23 Cal.App.4th 376, 390 n. 5 (1994)."

We disagree with appellant's statement of the applicable standard. The appellate court in *Korean American*, indeed held that a municipality's power to revoke a conditional use permit is limited, but not necessarily in the manner appellant suggests. First, the court noted that, if the permittee has incurred substantial expense and acted in reliance on the permit, the permittee has a vested interest in the property and thus is entitled to the protections of due process prior to the permit's revocation. (*Korean American, supra*, 23 Cal.App.4th at pp. 391-392 fn. 5.) The court then continued: " 'When a permittee has acquired such a vested right it may be revoked *if the permittee fails to*

comply with reasonable terms or conditions expressed in the permit granted [citations] or if there is a compelling public necessity, [Citations.] (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 157 [96 Cal.Rptr. 484].)' A compelling public necessity warranting the revocation of a use permit for a lawful business may exist if the conduct of a business as a matter of fact constitutes a nuisance and the permittee refuses to comply with reasonable conditions to abate the nuisance. *In these circumstances,* a municipality has the authority to remove such a business under its police power to prohibit and enjoin nuisances. [Citation.] However, in order to justify the interference with the constitutional right to carry on a lawful business it must be clear the public interests require such interference and that the means employed are reasonably necessary to accomplish the purpose and not unduly oppressive on individuals. (*Lawton v. Steele* (1894) 152 U.S. 133, 137 [38 L.Ed. 385, 388, 14 S.Ct. 499]; *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 717 [97 Cal.Rptr. 840].)" (*Korean American, supra,* 23 Cal.App.4th at pp. 391-392 fn. 5 [emphasis added].)

Interpreting this language in *Korean American,* we conclude two distinct grounds exist for revoking a use permit: (1) if the permittee fails to comply with reasonable terms or conditions expressed in the permit, *or* (2) if there is a compelling public necessity such as a nuisance. (*Korean American, supra,* 23 Cal.App.4th at pp. 391-392 fn. 5.) Moreover, the three requirements upon which appellant relies—that the public interest require municipal interference, that the means

employed are reasonably necessary to accomplish the purpose, and that the means employed are not unduly oppressive—relate to the second ground (the existence of a compelling public necessity) rather than to the first ground (the failure to comply with the permit's reasonable terms or conditions). (*Ibid.* See also *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 783 [a municipality may properly exercise its police power to revoke a use permit where the permittee fails to comply with the permit's conditions of use and existing zoning regulations.)

Applying this standard to this case, the City revoked appellant's use permit, not upon a showing of a compelling public necessity, but rather pursuant to BMC section 23B.60.020 after finding appellant had repeatedly failed to comply with certain of the permit's terms and conditions and had substantially expanded its use. Appellant has made no claim that the permit's terms and conditions were unreasonable, nor is there any doubt that, as discussed above, appellant received due process before the permit was revoked. As such, so long as substantial evidence established appellant's noncompliance with or substantial expansion of the permitted use, revocation of the permit was justified. (*Korean American, supra,* 23 Cal.App.4th at pp. 391-392 fn. 5; *Trans-Oceanic Oil, supra,* 85 Cal.App.2d at p. 783. Cf. *O'Hagen, supra,* 19 Cal.App.3d at pp. 159-160; *City of San Marino v. Roman Catholic Archbishop* (1960) 180 Cal.App.2d 657, 670 ["The facts constituting proof of an actual breach of conditions or of a clearly stated intention not to comply with the terms of a lawfully

issued permit may only be determined upon a proper hearing before a duly constituted body. Until such time as these facts are presented to a proper tribunal of the city and that body has acted upon them, no valid revocation can be accomplished."].) We thus turn to the relevant evidence.

IV. Does Substantial Evidence Support the Trial Court's Findings?

As we just explained, the trial court found substantial evidence supported the City's decision to revoke appellant's use permit pursuant to BMC section 23B.60.020 because (1) appellant failed to comply with one or more of the conditions set forth in the permit; and (2) appellant substantially expanded the permitted use in a manner beyond that set forth in the permit. We agree.

BMC section 23B.56.010 provides that "[a]ny approval permits only those uses and activities actually proposed in the application and excludes other uses and activities." Consistent with this provision, appellant's use permit set forth as a general condition that "the plans submitted with the application shall be followed and that all of the assurances and commitments contained in the original application shall be met except as they may be modified by the special conditions listed below." In addition, the use permit set forth as a specific condition that "the use permit shall be subject to review, attaching of additional conditions, or revocation if persistent complaints are received that the operation is detrimental to the neighborhood."

Appendix A

Here, undisputedly, appellant's use permit application did not propose to use public areas adjacent to the property for conducting the company's business operations. Nonetheless, there is ample evidence in the record that appellant did just that, resulting in persistent complaints from neighbors concerned about the welfare of their neighborhood.

In particular, the record proves that the City first issued appellant a Notice and Order to Correct in 1997 after receiving complaints from neighbors regarding the company's use of public streets for parking its vehicles. This first notice expressly warned appellant that all uses granted pursuant to the permit were "ON THE PROPERTY ONLY," and that violations of such restriction could lead to review and revocation of the permit. While there was evidence that complaints from neighbors regarding appellant's use of adjacent public property "sort of subsided" after the 1997 notice, the City issued a similar warning in June 2000 when such complaints resurfaced.

In 2004, the City received even more complaints regarding appellant's violations of the use permit by parking its trucks on the public right of way, leading the City to issue a Notice of Violation on September 15, 2004. Then, in 2006, the City began an investigation into appellant's operations after receiving "aggressive complaints" regarding the company's continued permit violations. During that investigation, the City discovered appellant was consistently parking as many as 30 of its vehicles on neighborhood streets adjacent to its

property, sometimes blocking cross walks and fire hydrants. Citations for these and other violations totaled $52,900 as of September 18, 2007.

Confronted with this evidence of recurring permit violations and persistent complaints, appellant argues that "nearly all of these vehicles [on the adjacent public streets] were parked by returning customers," and, thus, that the company was not responsible for it. We disagree. Ample evidence exists that appellant, not just its customers, parked the vehicles on the neighborhood streets. For example, the record reflects that appellant's employees were observed on numerous occasions storing or servicing its vehicles or even driving them recklessly on the adjacent public streets. Moreover, even if some of the vehicles parked on the adjacent streets were left by returning customers, it does not follow that appellant bears no responsibility. As a hearing officer observed after reviewing one of appellant's many citations, "it is a foreseeably cyclical, if not constant, result of [appellant's] conceded inability to absorb rental returns on its own lot" that led customers to park appellant's vehicles on adjacent public streets. Further, appellant "benefit[ted] from the volume of vehicles rented while at the same time operationally allowing rental vehicles to be frequently parked on the street[s]." As such, we reject appellant's attempts to shirk responsibility for using public rights of way for parking its vehicles.

We likewise reject appellant's argument that it "solved this problem" years before the City's decision

to revoke its use permit. In doing so, we acknowledge the evidence in the record that appellant considered certain corrective measures, such as opening a new facility in a nearby city with more parking and insisting that customers renting at the Berkeley facility return the vehicles elsewhere. However, there is no evidence that appellant in fact implemented each of the proposed corrective measures. Rather, the record reflects that, in August 2006, appellant met with the City to discuss proposed steps for addressing the violations of its use permit. The City thereafter agreed to a 30-day moratorium on its enforcement of the use permit, conditioned on appellant taking certain actions, including meeting with neighbors and stopping the parking of its vehicles on adjacent streets. However, after warning appellant that the moratorium was set to expire in two days and that the corrective steps were not yet implemented, the City resumed issuing citations. Thereafter, between August 2006 and June 2007, the City noted at least 24 incidents of appellant's use of adjacent streets for parking its vehicles, including four incidents in which the City counted between 29 and 39 trucks parked on the streets.

This evidence mirrors testimony received by the City Council at the revocation hearing from appellant's district vice-president, Jeremy Frank, who acknowledged that "some of the previous people in the president position . . . did make promises to the City to . . . make changes, and then failed to communicate to the proper people . . . [who] could make those changes. . . . And unfortunately, I can do nothing but apologize

profusely and say that . . . this just completely . . . escaped my attention." In addition, the City Council heard testimony from a City staff member who had in recent days observed eight of appellant's trucks parked on adjacent streets.

The evidence set forth above, we conclude, is sufficient to support the trial court's findings that appellant used public rights of way for staging, and thereby expanded its business operations beyond the property in a manner contrary to the terms and conditions of the use permit. The evidence is likewise sufficient to support the trial court's findings that appellant's neighbors, for several years, had persistently complained to the City regarding appellant's public staging, and that appellant failed to respond meaningfully to the City's "unequivocal notices" that the use permit did not permit such staging. Accordingly, we conclude, like the trial court, that the City was authorized under both California common law and BMC section 23B.60.020 to revoke appellant's use permit. (*Korean American, supra,* 23 Cal.App.4th at pp. 391-392 fn. 5; *Trans-Oceanic Oil, supra,* 85 Cal.App.2d at p. 783.)

In reaching this conclusion, we acknowledge appellant's additional argument that the trial court erred in finding that the use permit contained an enforceable term limiting appellant to 20 trucks on the property, and in finding that the City is not collaterally estopped by a hearing officer's decision that any such term was too vague to be enforced. Regardless of

whether appellant further violated the use permit by having more than 20 trucks on the property, for all the reasons stated above the City was authorized to revoke the use permit under the applicable law.[5]

---

5. Appellant admits that its use permit application proposed to use the property for "[a]pproximately 20 Rental Trucks and 30 Rental Trailers," and that the actual permit provided that "the plans submitted with the application shall be followed and that all of the assurances and commitments contained in the original application shall be met except as they may be modified by the special conditions listed below." Appellant claims, however, the phrase "approximately 20 trucks and 30 trailers" is ambiguous and should thus be interpreted to allow use of the property for a total of approximately 50 vehicles, irrespective of whether the vehicles are trucks or trailers. A hearing officer agreed with appellant's claim when deciding the validity of one particular citation issued against appellant in 2006. The trial court, however, rejected appellant's subsequent claim that the hearing officer's decision had a collateral estoppel effect in this litigation on the ground that the City lacked an adequate opportunity to litigate the issue. As explained above, we need not decide for purposes of this appeal whether the trial court's decision in this regard was correct.

Appendix A

DISPOSITION

The judgment denying appellant's petition for writ of mandate is affirmed.

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA DATED JANUARY 31, 2008

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
RENE C. DAVIDSON
ALAMEDA COUNTY COURTHOUSE

No. RG07352204

U-Haul Company Of California

Plaintiff/Petitioner(s)

vs.

City of Berkeley

Defendant/Respondent(s)

(Abbreviated Title)

Order

Petition for Writ Denied

The Petition for Writ was set for hearing on 01/31/2008 at 09:00 AM in Department 31 before the Honorable Frank Roesch. The Tentative Ruling was published and has not been contested.

Appendix B

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Petition Of U-Haul Company Of California ("PETITIONER") is DENIED. The findings of Berkeley City Council's Resolution No. 63,842-N.S., revoking and terminating Use Permit No. 7575 (the "UP") are supported by the weight of the evidence.

Respondent City of Berkeley's City Council may revoke a use permit if it finds that either (1) the holder of the permit has failed to comply with one or more of the conditions set forth therein; or (2) the permitted use has been substantially expanded or changed in character beyond that set forth in the permit. (BMC 23B.60.020.) The City Council found both and both findings are supported by the Administrative Record ("AR").

First, the UP includes a limit of "approximately 20 trucks and 30 trailers." This limitation is not so vague as to be unenforceable. Petitioner admitted to Respondent that Petitioner understood the UP to impose such limits and that Petitioner would endeavor to operate within those limits and/or obtain a modification of the UP. (AR 50, 54, 67, 75, 429.) The City Counsel's conclusion that Petitioner exceeded this limitation by a wide margin is supported by evidence that Petitioner parked 50 trucks on its property and parked many additional vehicles on the street. (AR 7-9, 16-17, 94.) Respondent is not collaterally estopped by the Hearing Officer's dismissal of the 2006 parking citation issued to Petitioner, which Respondent did not have standing to appeal. (See, e.g., Rest.2d Judgments, § 28(1), p. 273.)

Second, the UP does not expressly authorize Petitioner to use public property for staging its equipment. Uses not expressly allowed in a use permit are not authorized by that permit. (BMC 23B.56.010.) Outdoor uses are not permitted unless District regulations authorize them expressly and any required permit is obtained; this includes, but is not limited to, the outside storage of goods, containers and/or materials. (BMC 23E.16.020) Also, the UP assumes that staging would take place on Petitioner's property, and not on public streets or sidewalks, because it included landscaping and design measures intended to screen Petitioner's staging activities from the public. (AR 36-37, 46.) Petitioner used public rights of way for staging, and failed to respond meaningfully to Respondent's unequivocal notices that the UP did not permit public staging, going back to at least 1997. (See, e.g., AR 46-47.)

Third, the UP states that "the use permit shall be subject to review, attaching or additional conditions, or revocation if persistent complaints are received that the operation is detrimental to the neighborhood." (AR 36.) The administrative record does reflect a pattern of community complaints that Petitioner's street staging has adversely impacted the surrounding neighborhood. (AR 9-10, 243-36.)

Fourth, even if Petitioner may have a vested right to expand its business, Petitioner is not entitled to expand its operations beyond its own premises and onto adjacent public property. For all of the above-stated reasons, the Petition is DENIED.

Appendix B

Dated: 01/31/2008

s/ Judge Frank Roesch
Judge Frank Roesch

APPENDIX C — ZONING ADJUSTMENTS BOARD RESOLUTION NO. 07-02 DATED JULY 10, 2007

ZONING ADJUSTMENTS BOARD RESOLUTION NO. 07-02

RECOMMENDING THAT THE CITY COUNCIL, AFTER HEARING, (1) FIND THAT THE BUSINESS AT 2100 SAN PABLO AVENUE KNOWN AS "U-HAUL OF CALIFORNIA", IS IN VIOLATION OF USE PERMIT #7575, AND (2) REVOKE THAT USE PERMIT AND ORDER ITS TERMINATION

Whereas on June 28, 2007, the Zoning Adjustments Board held a duly noticed public hearing as required by Berkeley Municipal Code section 23B.60.030; and

Whereas the Zoning Adjustments Board has considered the staff report submitted for the hearing, as well as all of the evidence and testimony submitted at the public hearing.

NOW THEREFORE, BE IT RESOLVED, that the Zoning Adjustments Board recommends that the City Council find and determine as follows:

1. The following are conditions of Use Permit #7575:

    - No more than 20 trucks and 30 trailers are allowed on the lot at any time.

    - No vehicles of equipment shall be staged, stored, repaired or maintained in the public right of way at anytime.

Appendix C

- The hours of operation are 8:00 am to 7:00 pm daily.

- Four off-street parking spaces shall be provided for customers at all times.

- U-Haul shall comply with all Use Permit #7575 Design Review Conditions no later than 30 days from issuance of the Council's decision; and

2. The permitted use has been substantially expanded or changed in character beyond that set forth in Use Permit #7575;

3. The U-Haul business at 2100 San Pablo is and has been operating in violation of Use Permit #7575 based on the evidence in the report.

4. That the City Council, after hearing, revoke Use Permit #7575 for U-Haul of California, at 2100 San Pablo Avenue for the reasons set forth above, and enjoin and terminate the existing use.

s/ Debra R. Sanderson
Debra R. Sanderson,
Secretary,
Zoning Adjustments
Board

July 10, 2007
Date

APPENDIX D — CITY COUNCIL REVOCATION DATED OCTOBER 9, 2007

CONSENT CALENDAR
October 9, 2007

To: Honorable Mayor and Members of the City Council

From: Phil Kamlarz, City Manager

Submitted by: Sarah Reynoso, Deputy City Attorney*

Subject: Adoption of Findings – U-Haul Company, 2100 San Pablo Avenue

RECOMMENDATION

Adopt a resolution, including findings, that U-Haul, located at 2100 San Pablo Avenue, violated Use Permit No. 7575 and said permit is revoked and terminated, as previously determined by the City Council on September 18, 2007, after a public hearing.

FISCAL IMPACTS OF RECOMMENDATION

None. Existing staff costs of enforcement are already budgeted.

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* This report is submitted by Sarah Reynoso, Deputy City Attorney, because Zach Cowan, Assistant City Attorney, had a conflict of interest in this matter and the City Attorney was not present at the September 18, 2007 public hearing.

Appendix D

CURRENT SITUATION AND BACKGROUND

On September 18, 2007, the Council conducted a hearing upon the recommendation of the Zoning Adjustments Board ("ZAB") pursuant to Berkeley Municipal Code ("BMC") Chapter 23B.60, that U-Haul be found to have violated Use Permit No. 7575 and said permit be revoked and terminated. The Council concluded that the overwhelming weight of evidence supported the ZAB's recommendation. This report forwards the proposed findings and related order necessary under BMC Chapter 23B.60 when the Council revokes or terminates a use permit following public hearing.

RATIONALE FOR RECOMMENDATION

This resolution embodies the Council's action of September 18, 2007.

ALTERNATIVE ACTIONS CONSIDERED

None were considered in light of the Council's action on September 18, 2007.

CONTACT PERSON

Sarah Reynoso, Deputy City Attorney, 981-6950

Attachment

1. Resolution

Appendix D

RESOLUTION NO.

REVOKING AND TERMINATING USE PERMIT NO. 7575 ISSUED TO U-HAUL COMPANY, LOCATED AT 2100 SAN PABLO AVENUE, FOR VIOLATING THE TERMS OF THE USE PERMIT

WHEREAS, the U-Haul Company (hereafter "U-Haul") is a truck and trailer rental business located at 2100 San Pablo Avenue, in Berkeley, California, in the West Berkeley Commercial District of South Berkeley; and

WHEREAS, U-Haul has been in operation since July 1975; and

WHEREAS, U-Haul International, Inc. in Phoenix Arizona owns the property and Jeff Singleton, U-Haul Marketing Company President, and U-Haul Company of West Sacramento operate the business; and

WHEREAS, in May 1975, U-Haul submitted a use permit application and site plan that stated that there would be approximately twenty trucks and thirty trailers stored on the site, the hours of operation would be 8:00 a.m. to 7:00 p.m. and there would be four off-street parking spots on the U-Haul lot; and

WHEREAS, in June 1975, the Zoning Adjustments Board (hereafter "Board") granted U-Haul Use Permit No. 7575 based on its application that the use will include approximately twenty trucks and thirty trailers; and

Appendix D

WHEREAS, in September 1975 the City conducted an inspection and determined that U-Haul had constructed a building partially in the right of way. The City ordered U-Haul to submit an application for a revocable encroachment permit, which was granted by City Council Resolution No. 47,702-N.S.; and

WHEREAS, since 1997 U-Haul has repeatedly violated the conditions of Use Permit No. 7575 by greatly exceeding the number of trucks allowed on the property and using the public right of way to store additional vehicles; and

WHEREAS, in September 1997, the Zoning Compliance Officer issued U-Haul a *First Notice and Order to Correct*, in which U-Haul was specially warned that Use Permit No. 7575 allowed staging on the property only and that it was in violation of eight design review conditions placed on Use Permit No. 7575. In October 1997, U-Haul submitted a written response to the *First Notice* stating that (a) incoming trucks and trailers would be referred to the new Emeryville dealership when the Berkeley location is full; (b) premiums would be increased on one-way rentals; and (c) customers renting from Berkeley would be referred to other locations for returns; and

WHEREAS, on May 17, 2000, the City received a complaint from a neighborhood resident that U-Haul was using Addison Street, Tenth Street and Allston Way to store its vans. The resident complained to U-Haul and was told by U-Haul it had no room on its lot to store all the vehicles; and

Appendix D

WHEREAS, on June 14, 2000, in response to the May 17, 2000 citizen complaint, Code Enforcement Officer Maurice Norrise contacted U-Haul Assistant Manager Randy Hessler regarding the complaint and on June 16, 2000 issued U-Haul a *Courtesy Follow Up Notice* notifying U-Haul that it was unlawfully using the public right of way to store vehicles; and

WHEREAS, on August 21, 2000 the Code Enforcement Officer issued a criminal citation to Randy Hessler for illegally parking U-Haul trucks in the public right of way; and

WHEREAS, on September 14, 2000, Code Enforcement received a letter from Jim Buell, U-Haul Marketing Company President, stating that U-Haul would comply with its use permit in part, that all trucks parked by customers in the public right of way after hours would be removed by 10:00 a.m. the next day, and that U-Haul would apply for a variance to reduce the number of trailers and increase the number of trucks. However, U-Haul never filed any such application; and

WHEREAS, on August 23, 2004, in response to community complaints, Code Enforcement Officer Roy Phelps contacted Jeff Singleton, the new U-Haul Marketing Company President, regarding U-Haul's violating the conditions of the use permit by parking its trucks in the public right of way; and

Appendix D

WHEREAS, on September 15, 2004, the Code Enforcement Officer Roy Phelps issued a *Notice of Violation* to U-Haul manager Emerson Payumo because U-Haul continued to park its trucks in the public right of way despite prior warnings; and

WHEREAS, in May 2006, neighbors again complained that U-Haul was parking trucks on the street and blocking driveways. During the period from May 2006 and June 2006, Code Enforcement Officer Roy Phelps monitored U-Haul activity and warned U-Haul Manager Mike Neville that he would be cited if U-Haul continued to park trucks in the public right of way; and

WHEREAS, on June 13, 2006, after repeated inspections and warnings, the Code Enforcement Officer issued a $500 administrative citation (No. 0023) to U-Haul Manager Mike Neville for parking trucks on the public right of way. U-Haul did not appeal administrative citation No. 0023 and the $500 penalty was paid on August 31, 2006; and

WHEREAS, on August 23, 2006, Code Enforcement staff met with Jeff Singleton regarding U-Haul's unlawful practice of parking its trucks on the public right of way, and during this meeting staff pointed out to Mr. Singleton that the site plan posted in U-Haul's office was in violation of Use Permit No. 7575 because it showed U-Haul storing fifty trucks on the lot; and

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WHEREAS, at the August 23, 2006 meeting with Mr. Singleton, Code Enforcement staff gave Mr. Singleton a 30-day moratorium on further enforcement action and advised Mr. Singleton to do all the following: (1) submit an application to modify the current use permit; (2) schedule a meeting with the surrounding residential and commercial neighbors to discuss current and previous community concerns; (3) do not park U-Haul trucks on the public right of way; and (4) reduce the number of trucks on the lot to 20 trucks; and

WHEREAS, on September 21, 2006, Code Enforcement delivered to U-Haul Field Relief Manager Adam Craig a written notice for Mike Neville and Jeff Singleton that advised the City's 30-day moratorium on enforcement would expire on September 23, 2006, warned U-Haul that it must reduce the number of trucks it had on the lot (fifty-one at that time) to no more than twenty trucks, and requested that Mr. Neville or Mr. Singleton contact the Planning Department regarding their use permit violations; and

WHEREAS, on October 5, 2006, Code Enforcement Supervisor Gregory Daniel issued a citation warning letter to Mike Neville and Jeff Singleton in which he chronicled U-Haul's repeated violations of Use Permit No. 7575 and warned that because of U-Haul's history of non-compliance with the use permit that U-Haul would be cited for all violations to the full extent allowed under law; and

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WHEREAS, on November 16, 2006, U-Haul submitted by facsimile an application to modify Use Permit No. 7575 which was incomplete as it did not include the requisite fees, applicant statement, site photographs, vicinity map, site plan or the Zoning Use questionnaire and it did not comply with Planning Department procedures because facsimile applications are not accepted. On December 13, 2006, staff issued U-Haul a letter advising it that the modification application was incomplete and giving it ten days to file a completed application. U-Haul never completed the application; and

WHEREAS, on February 20, 2007, Peter Onken of U-Haul Company of West Sacramento, submitted another application to modify Use Permit No. 7575. Staff again determined that the application was incomplete in that it failed to address at least fourteen substantive issues regarding U-Haul's operation. On March 16, 2007 staff notified U-Haul its application was incomplete. U-Haul never responded nor submitted a revised application; and

WHEREAS, Code Enforcement has issued U-Haul nine separate citations between June 13, 2004 and February 13, 2007 for violations of Berkeley Municipal Code (BMC) 23B.56.010A, which prohibits any use or activity not proposed in the use application and BMC 23B.56.020A.8, which requires a modification for any change that expands, intensifies or substantially changes the use; and

Appendix D

WHEREAS, on August 21, 2006 Code Enforcement issued U-Haul Administrative Citation No. 0046 for violation of BMC Section 23B.56.020.A.8 for parking thirty-two (32) U-Haul trucks in the public right of way. The penalty was $200 per truck for a total citation of $6400. The citation was upheld on appeal to the City's administrative hearing officer, but has been appealed by U-Haul to the Alameda County Superior Court; and

WHEREAS, on September 25, 2006, Code Enforcement issued U-Haul Administrative Citation No. 0025 for violation of BMC Section 23B.56.020.A.8 for parking twenty-three (23) excess trucks on the U-Haul lot and imposed a penalty of $100 for each excess truck for a total citation of $2,300. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 2, 2006, Code Enforcement issued U-Haul Administrative Citation Nos. 2390 and 0049 for violations of BMC Section 23B.56.020.A.8. Citation No. 2390 was issued to U-Haul for parking two (2) U-Haul trucks in the public right of way. The penalty imposed was $300 for each truck parked in the right of way for a total penalty of $600. Citation No. 0049 was issued to U-Haul for the twenty (20) excess trucks it had parked on the U-Haul lot. The citation imposed a $200 per truck penalty for each truck in excess of the 20 allowed under the use permit, for a total penalty of $4,000. U-Haul failed to appeal either citation and the penalties remain outstanding; and

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WHEREAS, on October 11, 2006, Code Enforcement issued Administrative Citation No. 2391 for violations of BMC Sections 23B.56.010.A, 23B.56.020.A.8, 23B.56.030, and 23B.56.040 for parking 38 excess trucks on the U-Haul lot. The citation imposed a $100 per truck penalty for each truck in excess of the 20 allowed under the use permit, for a total penalty of $15,200. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 11, 2006, Code Enforcement also issued Administrative Citation No. 2392 for violation of BMC Section 23B.56.020.A.8 for parking two (2) U-Haul trucks in the public right of way. The penalty was $200 per truck for a total penalty of $400. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on November 3, 2006 Code Enforcement issued Administrative Citation No. 2651 for parking twenty-seven (27) excess trucks on the U-Haul parking lot. The citation imposed a penalty of $200 for each truck in excess of the 20 allowed under the use permit, for a total penalty of $21,600; and

WHEREAS, on November 15, 2006, U-Haul Marketing President Jeff Singleton filed an appeal of Administrative Citations No. 0046 and 2651. U-Haul argued that citation No. 0046 should be dismissed because the City could not regulate U-Haul's use of the public right of way. U-Haul also argued that citation No. 2651 should be dismissed because Use Permit

No. 7575 was vague and unenforceable because the application stated "approximately 20 rental trucks and 30 rental trailers" would be stored on the U-Haul lot. The hearing officer upheld citation No. 0046 but overturned citation No. 2651 on the ground that she found the use permit to be ambiguous and insufficiently detailed; and

WHEREAS, on February 13, 2007, Code Enforcement issued U-Haul Manager Mike Neville Administrative Citation No. 2394 for illegal dumping, under BMC 12.40.080. The penalty was $1,500, which was not appealed by U-Haul and was paid on March 15, 2007; and

WHEREAS, U-Haul appealed to the Alameda County Superior Court the City's Administrative Hearing Officer's decision on citation No. 0046 and has argued that it is not violating Use Permit No. 7575 by expanding its business beyond the property line to the public right of way. Trial is set on this matter for October 15, 2007; and

WHEREAS, on June 28, 2007, based upon U-Haul's numerous violations of Use Permit No. 7575, the Zoning Adjustments Board held a duly noticed meeting as required by BMC Section 23B.60.020 to determine whether to recommend to the City Council whether U-Haul is in violation of Use Permit No. 7575 and if so, the appropriate remedy; and

WHEREAS, no representative of U-Haul attended the Zoning Adjustment Board's hearing, nor did U-Haul submit any written statement; and

WHEREAS, upon conclusion of the hearing the Zoning Adjustments Board adopted Resolution No. 07-02 and recommended that the City Council revoke Use Permit No. 7575; and

WHEREAS, on September 18, 2007, the City Council held a duly noticed public hearing to consider the recommendation of the Zoning Adjustment Board and any other evidence that the public or concerned parties wished to present; and

WHEREAS, on July 25, 2007, the City Clerk sent to Mike Neville, U-Haul Company Berkeley, Tom Tollison, U-Haul International, Inc., Jeff Singleton, President, U-Haul Marketing Co., and Damien P. Lillis, U-Haul's legal counsel, a letter notifying them of the public hearing, as required by law, and of the procedure that would be followed at the September 18 hearing; and

WHEREAS, Jeremy Frank, U-Haul District Vice President, attended the Council hearing and submitted additional documents. Mr. Frank did not dispute U-Haul's violations of Use Permit No. 7575, and instead specifically acknowledged that the City could regulate U-Haul's use of the public right of way and apologized for U-Haul's violations of Use Permit No. 7575; and

Appendix D

WHEREAS, the City Council has carefully considered all of the evidence before it, including the June 28, 2007 staff report to the Zoning Adjustments Board, the transcript of the June 28, 2007 Zoning Adjustment Board, subsequent written communications, the staff report prepared for the City Council meeting on September 18, 2007 and the testimony and additional documents submitted at the public hearing on September 18, 2007; and

WHEREAS, no evidence was submitted at the Council hearing refuting Code Enforcement's numerous citations and notices to U-Haul of its violations of Use Permit No. 7575 by parking in excess of 20 trucks on the U-Haul lot and parking U-Haul trucks in the public right of way; and

WHEREAS, the City Council has evaluated the probative value of all of the above evidence, drawn reasonable inferences therefrom, and considered the credibility of the various witnesses, based on both their observed demeanor at the public hearing before the City Council and the substance of their testimony (e.g., whether it has been consistent over time, is internally consistent, is illogical, etc.); and

Appendix D

WHEREAS, based on its review of the evidence, the City Council finds as follows:

1. The proceedings before the Zoning Adjustment Board and City Council were conducted under the procedures provided by law.

2. The following are conditions of Use Permit No. 7575:

   a. No more than 20 trucks and 30 trailers are allowed on the lot at any time.

   b. No vehicles or equipment shall be staged, stored, repaired or maintained in the public right of way at anytime.

   c. The hours of operation are 8:00 a.m. to 7:00 p.m. daily.

   d. Four off-street parking spaces shall be provided for customers at all times.

   e. U-Haul shall comply with all Use Permit No. 7575 Design Review Conditions no later than 30 days from issuance of the Council's decision.

3. The permitted use has been substantially expanded or changed in character beyond that set forth in Use Permit No. 7575.

4. The U-Haul business at 2100 San Pablo is and has been operating in violation of Use Permit No. 7575.

5. Since 1997, U-Haul has been placed on notice that parking more than 20 trucks and 30 trailers on the U-Haul lot and using the public right of way to store U-Haul trucks violates Use Permit No. 7575.

6. Despite being advised by Code Enforcement how to apply for a modification of its Use Permit, U-Haul has never followed through and submitted a completed application for modification of Use Permit No. 7575.

7. Code Enforcement issued U-Haul nine citations for violation of Use Permit No. 7575 between the period from June 13, 2004 through February 13, 2007, for total penalties of $52,900.

8. Despite Code Enforcement's attempts during the last ten years to get U-Haul to conduct its business in compliance with Use Permit No. 7575, U-Haul has failed and continues to conduct its business in violation of Use Permit No. 7575.

9. U-Haul's apology at the September 18, 2007 public hearing does not negate its serious violations of Use Permit No. 7575 and is insufficient in light of the evidence which shows U-Haul's longstanding failure to comply with the use permit.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BERKELEY that U-Haul Company, located at 2100 San Pablo Avenue is hereby declared to be in violation of Use Permit No. 7575 under Berkeley Municipal Code 23B.60.020, and said Use Permit is hereby revoked and its operations are ordered to cease forthwith.

APPENDIX E — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REHEARING FILED JUNE 10, 2009

Court of Appeal, First Appellate District, Division Three - No. A121811
S172748

IN THE SUPREME COURT OF CALIFORNIA EN BANC

U-HAUL COMPANY OF CALIFORNIA,

Plaintiff and Appellant,

v.

CITY OF BERKELEY et al.,

Defendants and Respondents.

The petition for review is denied.

s/ GEORGE
Chief Justice

(2)

No. 09-308

Supreme Court, U.S.
FILED
OCT 13 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

U-HAUL CO. OF CALIFORNIA,

Petitioner,

v.

CITY OF BERKELEY, CITY COUNCIL OF THE CITY OF BERKELEY, LINDA MAIO, DARRYL MOORE, MAXWELL ANDERSON, DONA SPRING, LAURIE CAPITELLI, BETTY OLDS, KRISS WORTHINGTON, and GORDON WOZNIAK,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Three

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 15, Respondents City of Berkeley, City Council of the City of Berkeley, Linda Maio, Darryl Moore, Maxwell Anderson, Dona Spring, Betty Olds, Laurie Capitelli, Kriss Worthington and Gordon Wozniak (collectively referred to hereafter as "City") file this brief in opposition to the petition for writ of certiorari (hereafter "Petition") by U-Haul Company of California (hereafter "U-Haul"). The City will explain that the Petition simply does not meet the threshold requirements for invoking Supreme Court jurisdiction on certiorari since no federal question was decided by the California Appellate Court. *Not once* in its many briefs submitted to the Superior, Appellate or California Supreme courts did U-Haul ever reference any portion of the federal constitution. Accordingly, *none* of these courts ruled upon a federal constitution question. (See Appendices A, B and E to the Petition.)[1] Additionally, the federal issue U-Haul claims needs resolution was resolved by this Court in 1998.

The City will further point out that, even if the Court determines a federal question was actually raised and ruled upon, U-Haul's claim that its federal substantive due process right were violated fails as

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[1] All further references to Appendices A-C and E are to those included in the Petition. However, since U-Haul attached a resolution *not adopted* by the City Council as Appendix D, the City is required to attach the resolution in fact adopted by the City Council, Resolution Number 63,842, as Appendix A. The City will refer to this Appendix as "City's Appendix A."

well. U-Haul cites no law supporting its contention that it is entitled to violate its Conditional Use Permit (hereafter "CUP") *ad infinitum* and, as long as there is some other "lesser" remedy *available*, the City is forever prohibited from revoking it. Rather, the salient question before a public agency is whether such alternative remedies are *adequate* to protect the public welfare.

The record in this case establishes that, for over a decade, the community surrounding U-Haul's Berkeley location suffered due to its persistent refusal to comply with the unambiguous conditions of its CUP. These conditions reasonably limited U-Haul to storing 20 trucks on its lot and prohibited it from expanding its business into the public streets. Nonetheless, U-Haul packed its lot with trucks and the overflow converted the surrounding neighborhood into a U-Haul parking lot. The community had to endure the continual presence of U-Haul trucks monopolizing street parking and blocking driveways, fire hydrants, crosswalks, red and yellow zones and wheelchair ramps. Some residents also complained of cars being damaged by U-Haul trucks, that trucks were driven recklessly, and that trucks were serviced by U-Haul employees in the neighborhood.

Repeated requests by the City resulted only in multiple broken promises from U-Haul to alter its practices. When the City began its enforcement process, U-Haul claimed it was never subject to the 20 truck limitation and nothing prohibited it from using the streets as an adjunct parking lot. U-Haul later disavowed these defenses before the City

Council, when its representative stated that it had been aware of these limitations, did not dispute their application and admitted it had violated them and failed to legalize its operations. Ultimately, although the City Council believed that U-Haul might have been an asset to Berkeley had it acted legally, in the face of the uncontroverted record, it concluded that it had no choice but to revoke U-Haul's CUP.

U-Haul claims that it is seeking review to answer the question "[w]hether substantive due process review requires a consideration of the imposition of less drastic remedies in the case of permit revocation." Although no case stands for the proposition that a substantive due process violation arises from a mere failure to consider less drastic remedies, even if this were the standard, the record overwhelmingly establishes that the City did just that. Therefore, while it does not state it plainly, U-Haul is not actually complaining about the City's alleged failure to "consider" alternative remedies, but about the City's failure to "pursue" or "adopt" alternative remedies. (Petition at 23.)

Thus, U-Haul's Petition should be denied both on jurisdictional and substantive grounds.

STATEMENT OF THE CASE

Shortly after U-Haul was issued a CUP to operate a truck rental center in Berkeley in 1975, U-Haul's "use of public areas adjacent to [its]

property for conducting the company's business operations" created tension between itself and its neighbors. (Appendix A at 20a.) Repeating an allegation rejected by the Appellate Court, U-Haul claims without any support that it operated its facility "for over twenty years without significant incident or complaint." (Petition at 3.) However, testimony submitted by neighbors describes U-Haul violating its CUP as early as 1982 and repeatedly since then. (Administrative Record (hereafter "AR") 120, 128.) Additionally, the City's Hearing Officer described testimony she received which "confirm[ed] a history, dating back to 1975, of tension between U-Haul and its neighbors over the parking of rental [vehicles] on the streets . . . " (AR 99.)

Specifically, the neighbors had to endure U-Haul "consistently parking as many as 30 of its vehicles on the neighborhood streets . . . sometimes blocking cross walks and fire hydrants" and "employees . . . storing or servicing its vehicles or even driving them recklessly on the adjacent public streets." (Appendix A at 20a-21a.)

Once the City was made aware of the detrimental impact on the neighborhood, it repeatedly notified U-Haul over the course of a decade (in 1997, 2000, 2004, 2006 and 2007) that its actions were in violation of the following conditions of its CUP: 1) limiting it to storing 20 trucks and 30 trailers on its lot; 2) limiting its operations, including storage and staging of its equipment, to its property only; and 3) prohibiting its operations from creating persistent

complaints of detriment to the neighborhood. (*Id.* at 2a-3a and 20a-21a.) The City continually warned U-Haul that violations of this nature could lead to revocation and/or citations. (*Id.*) In fact, as the Appellate Court noted, the potential for revocation due to these types of violations was set forth on the face of U-Haul's CUP itself.[2]

In response to these notifications and warnings, U-Haul repeatedly promised to alter its practices in order to comply with its CUP, but "there is no evidence that [it] in fact implemented each of the proposed corrective measures." (*Id.*)

Amazingly, U-Haul claims "[i]n 2006 and 2007, at the direction of City staff, [it] applied for a use permit modification to increase the number of trucks allowed, decrease the number of trailers allowed, and to include spaces for overflow trucks." (Petition at 3.) In reality, U-Haul submitted a one-page fax purportedly seeking to modify its CUP in 2006. (AR 11, 66-67.) However, it did not include the requisite fees, applicant statement, site photographs, vicinity map, site plan or Zoning Use questionnaire. (AR 66-67.) The City notified it of the deficiencies and gave it ten days to resubmit. (AR 69-70.) U-Haul never did so. (AR 11.)

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[2] "Relevant here, the use permit set forth as a special condition that 'the use permit shall be subject to review, attaching of additional conditions, or revocation if persistent complaints are received that the operation is detrimental to the neighborhood.'." (*Id.* at 2a-3a.)

In 2007, U-Haul submitted another application. (AR 72-80.) Once again, the application was substantially incomplete and the City notified U-Haul. (AR 82-84.) Specifically, the City found that the site plan did not represent a realistic configuration that could accommodate the proposed number of trucks and trailers, plus employee and customer parking. (AR 82.) Yet again, U-Haul did not respond. (AR 11.)

As late as 2006, the City agreed to a 30 day moratorium on enforcement on the basis of U-Haul's pledge to bring its operations into compliance with its CUP. (*Id.* at 22a.) U-Haul failed to do so and, when the City resumed enforcement efforts after its expiration, there were "at least 24 incidents of [U-Haul's] use of the adjacent streets for parking its vehicles" and "[o]n four occasions, between 29 and 39 trucks parked on the streets." (*Id.* at 5a.)

Since U-Haul had proved impervious to the City's enforcement efforts and since it failed to adhere to any of its multiple promises to reform, the City was forced to begin the revocation process. Contrary to U-Haul's claim that the City's Zoning Adjustments Board (ZAB) "commissioned a staff report regarding U-Haul's business operations"[3], Code Enforcement staff initiated the revocation process by presenting their recommendation to the ZAB based upon their inability to gain compliance from U-Haul despite a

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[3] Petition at 4.

decade worth of effort. In particular, the staff recommendation states:

> [T]he evidence to date shows that U-Haul has consistently operated in a manner that requires it to store far more than the number of trucks permitted by Use Permit 7575, with the result that its operation has spilled out onto the street, thereby causing detriment to nearby residents. In staff's view, it is clear from the documents associated with the 1975 approval . . . that this level of detriment was neither contemplated nor approved at the time.

(AR 14.)

A public hearing was held before the ZAB to consider "whether the U-Haul business at 2100 San Pablo Avenue is in violation of Use Permit #7575 under BMC 23B.60.020[4] and, if so, the appropriate remedy" in 2007. (AR 7.) U-Haul did not appear or submit any response to the staff's allegations of CUP violations and ZAB recommended that the City Council revoke its CUP. (Appendix A at 5a-6a.)

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[4] As both the Superior and Appellate Court noted Berkeley Municipal Code (BMC) Section 23B.60.020 allows the City Council to "revoke a use permit if it finds that either (1) the holder of the permit has failed to comply with one or more of the conditions set forth therein; or (2) the permitted use has been substantially expanded or changed in character beyond that set forth in the permit." (Appendix A at 15a.)

At the subsequent City Council public hearing, U-Haul's District Vice-President "acknowledged and apologized for [U-Haul's] repeated violations of its use permit, and for its failure to implement steps to correct them in a timely fashion." (*Id.* at 6a.) In the face of the uncontroverted record, the City revoked U-Haul's CUP finding that U-Haul's "apology . . . does not negate its serious violations of Use Permit 7575 and is insufficient in light of the evidence which shows [U-Haul's] longstanding failure to comply with the use permit." (Appendix A at 6a citing City's Appendix A at 14.)

U-Haul implies that its "counsel proposed less drastic measures" *prior* to the City's vote to revoke at the public hearing. (Petition at 6.) However, U-Haul's counsel *did not appear* at the public hearing at all. Rather, *after* the public hearing was closed, he submitted materials and was allowed to argue on his client's behalf, despite the Council's rules, and despite no notice to the complaining neighbors. (AR 427-492, 509-510.) The Council specifically stated in Resolution Number 63,842 that U-Haul's counsel's submittal was provided "after the Council had closed the public hearing" and it was, therefore, "untimely" and "not admitted into the record." (City's Appendix A at 11 and 14.)

Despite this, the Council *did* consider U-Haul's counsel's submittal and presentation, but rejected it stating "there can be no estoppel as the City has never made any representations to U-Haul that its conduct was lawful and has in fact for numerous

years placed U-Haul on notice that it is in violation of the conditions of its use permit." (*Id.* at 12.)

U-Haul then filed a complaint and petition for writ seeking to overturn the revocation. (Appendix A at 6a.) After exercising its independent judgment, the Alameda County Superior Court denied the petition finding the weight of evidence supported the City's determination to revoke the CUP for violations of its conditions. (Appendix B.)

U-Haul then voluntarily dismissed the entire action without prejudice and appealed from that dismissal.[5] (Appendix A at 7a.) In an unpublished, unanimous decision, the California Appellate Court for the First Appellate District upheld the trial court's determination on all bases. (*Id.* at 10a.) Specifically, the Appellate Court determined that the "City was authorized under both California common law and BMC Section 23B.60.020 to revoke appellant's use permit." (*Id.* at 23a.)

U-Haul then petitioned the California Supreme Court for review of the following issue only[6]: "[w]hat

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[5] U-Haul blithely continued to operate at the Berkeley location and the City was forced to file a separate action to enjoin its operations, in which the court granted a preliminary injunction. (Alameda County Superior Court Case No. RG0838856.)

[6] California Rule of Court 8.504(b)(1) requires that a petition for review include a "statement of the issues presented for review. . . ." Thus, review is limited to those issues presented for

(Continued on following page)

is the appropriate standard of review that a government body must meet to revoke a use permit under which a business has a vested property right?" (U-Haul's Petition for Review to California Supreme Court at 1.) (hereafter "Petition for Review.") The California Supreme Court denied the petition for review on June 10, 2009. (Appendix E.)

ARGUMENT OR REASON FOR DENYING THE PETITION

I. The Petition Fails To Meet The Threshold Requirements For Invoking This Court's Jurisdiction On Certiorari

Supreme Court Rule 10 provides that certiorari is entirely discretionary and will be granted only for "compelling reasons." The Rule enumerates the criteria that the Court will consider in evaluating a Petition for Writ of Certiorari. U-Haul completely fails to address how its Petition presents a compelling basis for certiorari within the ambit Rule 10.

Since U-Haul does not mention which criterion it seeks certiorari under, the City presumes it to be either subsection (b) or (c), as these provisions relate to state court rulings. Subdivision (b) states: "a state court of last resort has decided an important federal

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review by the petitioner unless the court orders review on its own motion pursuant to California Rule of Court 8.512(c).

question in a way that conflicts with another state court of last resort or of a United States court of appeals." Subdivision (c) states "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this court or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Neither provision is applicable here because: (1) as the lack of a certificate declaring that a federal question was decided highlights, the Appellate Court did not decide *any* "federal question" let alone an "important federal question"; and (2) the "important federal question" U-Haul claims requires "resolution and guidance from this Court"[7] *was, in fact, settled* by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

A. In Considering Whether Revocation Was An Appropriate Remedy For U-Haul's Use Permit Violations, The Appellate Court Based Its Decision Solely On California Law

U-Haul complains that its right to substantive due process under the Fourteenth Amendment of the United States Constitution was violated by the City's decision to revoke its CUP for its Berkeley location. (Petition at 22.) However, U-Haul did not raise a federal claim before the California courts. *Not once* in

[7] Petition at 2.

any of its briefs before the Superior, Appellate or California Supreme Courts did U-Haul cite to or rely upon the federal constitution. Hence, none of these courts ruled upon a federal substantive due process claim. (See Appendices A, B and E.)

Indeed, U-Haul failed to formulate its challenge to the City's choice of remedies as a federal substantive due process violation until *this Petition*. Rather, before the Superior Court, U-Haul's challenge to the City's choice of the revocation remedy was stated in the following terms "Berkeley Municipal Code § 23B.60.020(B) Does Not Apply to a Vested Operation" and it argued that "*under California law*" "vested operations have a right to expand and change their operations in response to changes in demand. . . ." (Clerk's Transcript at 169-170.) (emphasis added.)

Before the Appellate Court, U-Haul repeated this challenge in the following terms: "[t]he record as a whole indicates that the revocation is unjustified" and, citing *California law alone*, argues "[a]s a whole, the record fails to rise to the level of a compelling public necessity to justify the interference with a vested right to continue business operations and a remedy as draconian as revoking the permit." (U-Haul Opening Brief on Appeal at 23-26.) Moreover, in its Reply Brief on this point U-Haul asserts: "[i]t should – and *under California law*, does – take more than a few minor citations from a limited time period to justify [revocation]." (U-Haul Reply Brief on Appeal at 13.) (emphasis added.)

Finally, before the California Supreme Court, U-Haul alleged "decisions rendered in *California courts* have explicitly applied the heightened standard to the state's 'interference with a constitutional right to carry on a lawful business'." (Petition for Review at 1 citing *O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151 (1971).) (emphasis added.) The result is that no court in this controversy ruled on a federal claim. (See Appendices A, B and E.)

This Court has held in *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) "[w]ith very rare exceptions, we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."

In particular, in *Bowe v. Scott*, 233 U.S. 658, 665 (1914), this Court held that an argument referencing "due process of law" which "mak[es] no reference to the Constitution of the United States and assert[s] no express rights thereunder is solely referable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court." The ruling in *Bowe v. Scott* was recently followed in *Adams v. Robertson*, 520 U.S. 83, 89 (1997), which held "the passing invocations of 'due process' . . . fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution . . . and thus they did not meet our minimal requirement that it must be clear that a

federal claim was presented." As is true with Virginia and Alabama, California's Constitution also includes a due process clause[8] and U-Haul's failure to refer to the federal constitution in *any* of its papers, coupled with its sole reliance upon California law, undoubtedly demonstrates a lack of a federal question.

Indeed, U-Haul *admits* this lack of jurisdiction in its Petition by stating "the [trial] court did not address U-Haul's constitutional contentions whatsoever." (Petition at 7.) However, it claims that, because it cited a California appellate case (*Korean Am. Legal Found. v. City of Los Angeles*, 23 Cal.App.4th 376 (1994)), in support of an argument[9] before the trial court, and this California case, in turn, cited a federal case (*Lawton v. Steele,* 152 U.S. 133 (1894)), a federal question was sufficiently raised in order to vest this Court with jurisdiction. (*Id.* at 6-7.) This is obviously insufficient to raise an "important federal question" for purposes of a grant of certiorari.

Continuing in its effort to rewrite the state controversy as a federal question, U-Haul goes so far as to *insert* a reference to the *Lawton* holding *into a quote* from the Appellate Court's decision. (Petition at 8.) In reality, however, because U-Haul failed to raise any federal question before the Superior or Appellate

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[8] California Const., Art. I § 7(a) states "[a] person may not be deprived of life, liberty, or property without due process of law."

[9] Clerk's Transcript at 169-170.

Court, the Appellate Court relied upon *only Korean American, supra*, and *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776 (1948), to support its holding that the City properly revoked its CUP because the permit conditions were repeatedly and substantially violated. (Appendix A at 17a-18a.)

Ignoring Rule 10, U-Haul claims very generally that its Petition is subject to a grant of certiorari pursuant to 28 U.S.C. § 1257(a).[10] This Section states that this Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

However, as set forth in *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), a "federal question [must be] raised, preserved, or passed upon in the state courts below" before this Court is vested with jurisdiction. The Court explained:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act

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[10] Petition at 1.

> of 1789 . . . vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, *Miller v. Nicholls*, 4 Wheat. 311, 315 (1819), and since, e. g., *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.*, 360 U.S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-163 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *Whitney v. California*, 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis*, 20 Wall. 590 (1875).

(*Id.*)

U-Haul sought and was denied review from the California Supreme Court on the basis of the following issue only: "[w]hat is the appropriate standard of review that a government body must meet to revoke a use permit under which a business has a vested property right?" (Petition for Review at 1.)

Thus, it sought review of the Appellate Court's determination regarding the appropriateness of the revocation remedy chosen by the City pursuant to California law *only* and not whether it was denied substantive due process under the Fourteenth

Amendment. Consequently, *the Appellate Court did not decide any federal question* let alone an "important federal question" compelling enough for this Court to grant certiorari.

B. The Important Federal Question U-Haul Claims Needs Resolution Was Settled By This Court In 1998

In an attempt to fall within the ambit of Rule 10(c), U-Haul characterizes the arena of substantive due process as "conflicted and in need of resolution and guidance from this Court." (Petition at 2.) In support of this statement, it cites one law review article written 3 years before this Court's ruling in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (*Id.* citing David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 Ga.L.Rev. 769, 770 (1995).)

Claiming that "some courts have gone astray" and "various standards of review have cropped up", U-Haul inexplicably cites to this Court's holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (*Id.* at 16.) However, as this Court stated in *Lewis*, "[o]ur cases dealing with abusive executive action have *repeatedly emphasized* that only the most egregious official conduct can be said to be arbitrary in the constitutional sense." (*County of Sacramento, supra,* at 846 citing *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992), and *Daniels v. Williams,* 474 U.S. 327, 332 (1986).) (emphasis added.) It further observed that "*for half a century now* we have spoken

of the cognizable level of executive abuse of power as that which shocks the conscience." (*Id.*) (emphasis added.) The Court concluded:

> Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.

(*Id.* at 848.)

Maintaining its criticism, U-Haul asserts that the standard employed in *County of Sacramento* is "largely undefined and therefore subjective" and inquires rhetorically, "what does it mean to 'shock the conscience'?" (Petition at 19.) U-Haul concludes that "the nation's courts should not continue to pick and choose among vague, inappropriate tests." (*Id.*)

However, this Court rejected the notion that substantive due process analysis must be fixed with rigid parameters in *County of Sacramento*. Rather, it stated very plainly:

> What we have said of due process in the procedural sense is just as true here:
>
> The phrase due process of law formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental

> fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

(*County of Sacramento, supra,* at 850.)

As the California Supreme Court noted in *Galland v. Clovis*, 24 Cal.4th 1003, 1030 (2001), cert. denied, 534 U.S. 826 (2001), *County of Sacramento* is this Court's "recent clarification of the meaning of substantive due process. . . ." Thus, it is not just one of many of the "nation's courts" which chose a "vague [and] inappropriate test[ ]." It is *this Court's* latest and definite expression of the "meaning of substantive due process." (*Id.*) Rule 10(c) was not intended to solicit repeated challenges to this Court's rulings because litigants believe they are somehow inadequate.

Illuminating the weakness of U-Haul's argument further is the fact that the two cases cited by it as evidence of the "myriad of tests" were both decided *prior* to *County of Sacramento*.[11] Thus, U-Haul implicitly recognizes that this Court has recently spoken on the appropriate test to determine substantive due process violations. However, as is true with every court it has appeared before so far, it simply does not like what it has heard. As a result, its claim that

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[11] See Petition at 16-20 citing *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991); and *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992).

there is confusion among the federal courts on this subject is as faulty as its claim that the Appellate Court here ruled on a federal question.

II. The City Did Not Deny U-Haul Substantive Due Process By Revoking Its CUP

In addition to the insufficiency of U-Haul's Petition under Rule 10 and 28 U.S.C. § 1257(a), its argument fails on the merits.

U-Haul argues that the City was constitutionally required to "pursue" or "adopt a less draconian remedy"[12] than revocation in light of the record before the City Council. This is tantamount to arguing that it is constitutionally entitled to continue operating its business no matter the severity or the frequency of its CUP violations as long as some remedy less draconian than revocation is available. In other words, under U-Haul's argument, it may continue operating in violation of its permit indefinitely since such remedies are *always available*. Rather, the salient question before a public agency is whether such alternative remedies are *adequate* to protect the public welfare. This is the essence of what local governments exist to do.

Not surprisingly, U-Haul cannot cite any law supporting its argument. Instead, it devotes the bulk of its Petition to a discussion of "multiple standards" applied by various state and federal courts across the

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[12] Petition at 23.

country (including standards relating to a Takings claim) which fail to "protect the property owner's constitutional right to substantive due process,"[13] none of which speak to the circumstances here except in the broadest of generalities.

The City does not quarrel that U-Haul is entitled to substantive due process, but no case stands for the proposition that a business is entitled to violate its CUP *ad infinitum* and, as long as there is some other "lesser" remedy available, the City is forever prohibited from revoking it.

To the contrary, relying on *County of Sacramento*, the California Supreme Court in *Galland* held, in the land use context, that:

> In determining whether a constitutional injury has taken place, we follow the path of the United States Supreme Court and other courts in asking whether government agents have deliberately committed obstructive and unlawful acts designed to interfere with . . . property rights.

(*Galland v. City of Clovis, supra,* at 1039-1040.)

U-Haul has not claimed that the City "deliberately committed obstructive and unlawful acts designed to interfere with [its] property rights" in this case.

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[13] Petition at 19.

A. Courts Have Distinguished Between Nuisance Abatement And Permit Revocation Actions

Because its argument cannot be sustained under the law applicable to revocation of CUPs, U-Haul tries to apply case law relating to nuisances and other distinct situations[14] to revocation of a conditional use permit. It cannot do so, however, since the fundamental natures of nuisance abatement and permit revocation are substantially different. In particular, where an entity has not received notice that a course of conduct is considered a public nuisance, and the government moves directly to an order to cease all operation, rather than first imposing conditions designed to eradicate the nuisance, it is appropriate

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[14] For example, U-Haul relies upon *U.S. v. Cohen*, 268 F. 420 (E.D. Mo. 1920); *Lawton v. Steele*, 152 U.S. 133 (1894); and *Korean Am. Legal Advocacy Found. v. City of L.A.*, 23 Cal.App.4th 376 (1994), which all involved nuisance abatement actions.

It also relies upon other inapposite cases: an inverse condemnation challenge to a wetlands restoration ordinance (*Presbytery of Seattle v. King County*, 114 Wash.2d 320 (1990)); a challenge to an ordinance regulating the operation of street cars in San Francisco (*City and County of San Francisco v. Market Street Railway Co.*, 98 F.2d 628 (1938)); a takings challenge to a rent cap on gas service station rent (*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)); a takings challenge to an ordinance prohibiting certain types of excavations (*Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)); and a due process challenge to a punitive damages award (*BMW v. Gore*, 517 U.S. 559 (1996)). (Petition at pp. 13-16 and 20-22.)

that courts have required a certain level of proportionality.

In contrast, a conditional use permit is conditional by its very nature and, upon receipt, the holder is immediately put on notice of the conduct required in order to comply with its conditions and, thereby, avoid revocation – as was the case here. Consequently, courts have properly recognized a distinction between actions involving nuisance abatement and permit revocations.

For example, the Appellate Court relied upon *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776 (1948), for its determination that a CUP may be properly revoked for failure to comply with its conditions. (Appendix A at 18a.) Specifically, the court in *Trans-Oceanic* held "[i]f the permittee . . . fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it." (*Trans-Oceanic, supra,* at 783 citing *Vincent Pet. Corp. v. Culver City*, 43 Cal.App.2d 511 (1941) [upheld revocation of permit to drill for oil for failure to comply with permit condition to commence operations within a time certain]; and *Godson v. Town of Surfside,* 150 Fla. 615 (1942) [upheld revocation of permit to construct hotel for failure to comply with representations made in permit application which became conditions of the permit].)

The Appellate Court further relied upon the holding in *San Marino v. Roman Catholic Archbishop,* 180 Cal.App.2d 657, 670 (1960), that "facts

constituting proof of an actual breach of conditions or of a clearly stated intention not to comply with the terms of a lawfully issued permit" constitutes a proper basis for revocation of a CUP. (Appendix A at 18a-19a.)

Many other California courts have also come to the same determination. "[W]ith respect to revocation of a conditional use permit, it is constitutionally sufficient if the administrative body is required to make its decision in accord with the general health, safety and welfare standard." (*Garavatti v. Fairfax Planning Com.*, 22 Cal.App.3d 145, 150 (1971) citing *Livingston Rock, etc. Co. v. County of L.A.*, 43 Cal.2d 121 (1954); *Cantrell v. Board of Supervisors*, 87 Cal.App.2d 471 (1948); and Cal. Zoning Practice (Cont. Ed. Bar 1969) § 7.73, p. 308).)

"When a permittee has acquired . . . a vested right [in a permit] it may be revoked if the permittee fails to comply with reasonable terms or conditions expressed in the permit granted." (*O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151, 158 (1971) citing *Trans-Oceanic, supra,* at 783 and *Brougher v. Board of Public Works*, 205 Cal. 426, 433 (1928).) (See also *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal.App.4th 1519, 1530-1531 (1992) citing *O'Hagen, supra*, at 158; *Trans-Oceanic, supra*; *Upton v. Gray*, 269 Cal.App.2d 352 (1969); and *Community Development Com. v. City of Fort Bragg*, 204 Cal.App.3d 1124 (1988); and *Korean Am. Legal Advocacy Found. v. City of L.A.*, 23 Cal.App.4th 376, 392 (1994) citing *O'Hagen, supra*, at 158.)

"A CUP is conditional by definition, and the violation of conditions attached to its grant may lead to revocation." (*Malibu Mts. Rec. v. County of L.A.*, 67 Cal.App.4th 359, 367 (1998) citing 8 Cal. Real Estate Law & Practice (1998), Nonconforming Uses, § 262.05[3], p. 262-19.)

"[A] use may be operated in a manner that violates the conditions of approval or negatively impacts adjacent properties. Local agencies have certain tools at their disposal to deal with these problem uses, including revocation of the CUP." (Cal. Land Use Practice (Cont. Ed. Bar 2008) § 7.17, p. 318.)

Thus, U-Haul cites no applicable law for its proposition that the City must "demonstrate . . . evidence that . . . alternative remedies would be ineffective or unfeasible" before it may revoke a CUP for condition violations or else commit a substantive due process violation pursuant to the federal constitution. (Petition at 23.)

B. California Courts' Application Of Due Process Principles To Revocation of Conditional Use Permits

California courts have interpreted due process as requiring the following with regard to permit revocation: "In revoking a permit lawfully granted, due process requires that it act *only upon notice to the permittee, upon a hearing, and upon evidence substantially supporting a finding of revocation.*" (*San Marino, supra*, at 669 citing *Trans-Oceanic, supra,* at

783.) (original emphasis.) (See also *Angelopulos v. Bottorff,* 76 Cal.App. 621, 625 (1926); and *Cmty. Dev. Com. v. City of Fort Bragg*, 204 Cal.App.3d 1124, 1132 (1988).)

This standard is harmonious with the *Galland* ruling. As the court in *Galland* expressed:

> [O]ther cases both before and after *County of Sacramento* have affirmed in a variety of contexts, using a variety of verbal formulations, the principle that the arbitrary government conduct that triggers a substantive due process violation is not ordinary government error but conduct that is in some sense outrageous or egregious – a true abuse of power.

(*Galland, supra*, at 1032.)

In accordance with this authority, U-Haul was provided all the process that it was due. Not only were the conditions of its CUP clear and the potential for revocation set forth on the face of its permit, it was repeatedly notified over the course of a decade that its violations of the CUP could lead to revocation, it was properly notified of the City's proposed action and the action was considered at two public hearings before both the ZAB and the City Council. (Appendix A at 2a-6a.)

Reviewing the City Council's decision, the trial court properly applied the independent judgment standard pursuant to Code of Civil Procedure Section 1094.5(c). (Reporter's Transcript of January 31, 2008

at p. 2 lines 16-18.) It found, and the Appellate Court concurred, that the City's "findings . . . revoking and terminating Use Permit No. 7575 are supported by the weight of evidence." (Appendix B at 27a.)

Thus, U-Haul's due process rights were not violated since it was provided with notice of the City's proposed revocation, a public hearing regarding the proposed revocation and the City's revocation was based upon evidence substantially supporting it as determined both by the Superior and Appellate Courts. Nothing resembling "a true abuse of power" can be inferred, let alone proven, from the record in this case.

C. The Record Amply Demonstrates That The City Determined Other Remedies to U-Haul's Use Permit Violations Were Inadequate

Even if U-Haul's proposed standard was correct, the City engaged in the *very act* U-Haul asserts was required by due process, namely, consideration of the appropriate remedy for U-Haul's uncontroverted and long-term violations. Thus, U-Haul's real complaint is not that the City failed to *consider* other remedies, but that *upon consideration* of U-Haul's steadfast violation of the law regardless of continual promises to conform, the City *rejected* other remedies as inadequate. Hence U-Haul's protests that the City did not "*pursue* alternative remedies" and "it was certainly feasible for the City *to adopt* a less

draconian remedy." (Petition at 23.) (emphasis added.)

Indeed, *the very fact* that City staff initially recommended further conditioning U-Haul's CUP to the ZAB demonstrates that the City *considered* other remedies. U-Haul cites the ZAB's transcript as evidence of its alleged due process violation. (Petition at 23 citing AR at 146.) However, rather than support U-Haul's position, this 19 page transcript reveals an administrative body struggling to comprehend U-Haul's resolute determination to flout the City's laws in the face of potential CUP revocation, to the point that it did not even bother to appear at the ZAB's hearing. (AR 133-152.) Specifically, it makes evident the Board's consideration of and disagreement with the staff recommendation, based upon U-Haul's tenacious behavior. Boardmember Allen observes:

> Well, I think the one neighbor who spoke pretty much made the case I was going to make. I don't think there's anything in U-Haul's performance or actions to suggest that our simply suggesting to Council that they should restate the terms of the Use Permit will have any effect on them. So I'm going to move that ZAB recommend to Council that U-Haul's Use Permit be revoked.
>
> It is clear U-Haul doesn't get it. They don't get what they've done to the neighborhood and they don't even get it enough to come appear at this hearing.

> My concern is that merely restating . . . what the Use Permit says, which to me is unambiguous, they haven't followed it for all these years, what is the difference now? I think the only action is to simply revoke the permit.

(AR 139, 140 and 142.)

Following this discussion, Boardmember Doran advocates for a different approach:

> Well, from my point of view, if a situation could be enforced, that U-Haul could continue to function, tha[n] I personally think that is of benefit to the City. That a U-Haul facility, in that location, run according to the permit that they've been given to me would be the ideal situation.
>
> So, I've only suggested . . . that I would be comfortable with supporting the staff recommendation and only adding . . . that they have 30 days to conform. . . . That is something they could start tomorrow, if they were serious.
>
> [T]hat our recommendation be . . . empower the City to monitor what is going on, and [if] there are any violations after 30 days, their permit [i]s revoked. [W]e'll give you 30 more days to get your act together.

(AR 143-144.)

Considering this, Boardmember Shumer states:

> There's been a history of being warned, being cited, being told. Maybe temporary compliance. I'm afraid that if we advise the City Council to give them 30 days, we really start the whole enforcement-compliance all over. So that we're going to have to [be] the police and whomever visit[s] the site on a regular basis for the next umpteen times. I think they have had more than 30 days to recognize that the City has a problem with their behavior.

(AR 144-145.)

After reflecting on Boardmember Allen's concerns regarding the City's Hearing Officer's dismissal of part of a citation issued to U-Haul, Boardmember Judd states:

> I just want to add [that] the hearing officer upheld part of the charge . . . that had to do with parking vehicles offsite which I think, given how long it's gone on and how the U-Haul folks have responded, prior to citations and how much City time and money has been invested, would be enough to support [the revocation] motion in and of itself.

(AR 147-148.)

Next, Chair Tiedemann states:

> The fact [that] they didn't even send a representative here tonight, given the number of citations that have been issued by the City,

> leads me to the conclusion that they really don't deserve one last chance. . . .

(AR 149.)

Speaking to the 30 day proposal, Boardmember Alvarez-Cohen states:

> I appreciate your attempt to try to save this resource for Berkeley. But it's clear that they have a patter[n] of behavior that [is not] compatible with that location. So I don't think we should give them another chance.

(AR 150.)

Consequently, the ZAB discussion very clearly represents the considerable thought it gave to diverting from the staff's recommendation. What's more, it undertook this deliberation *absent any input* from U-Haul itself to the City's proposed action. Record of this deliberation was provided to the City Council for its determination and it specifically noted that it "carefully considered" it in adopting Resolution Number 63,842. (City's Appendix A at 10.)

Moreover, rather than "refuse" to consider alternatives as U-Haul claims, the Berkeley City Council expressed its *regret* in being forced by U-Haul's conduct to take an action they did not wish to.

> Councilmember Moore: [I am] very disappointed that U-Haul waited until the very last moment on the very last day to contact me when they could have done this months

> ago or they could have done this with the community months ago.

(AR 405.)

> Councilmember Capitelli: I find this an incredibly depressing situation because I think the rental of these pickup trucks is a real resource and asset for the community. But in reading the public record, it's just absolutely stunning. [I]t's just amazing that one could ignore the situation for so long. And I know there are good jobs involved down there that probably pay well. And I'm sorry to support the motion . . .

(AR 406.)

Based upon these unhappy circumstances, the Council voted unanimously to adopt a resolution which sets forth in great detail all bases for revoking U-Haul's CUP. (City's Appendix A.) Nonetheless, U-Haul characterizes the City's careful contemplation of its action as equating to "no meaningful discussion." (Petition at 23.)

Thus, it is evident that U-Haul's complaint about the City process – one it chose not to engage in – is no more than a complaint about the result. The City provided U-Haul with many opportunities to act responsibly over the course of a decade. Rather than act in compliance, U-Haul has persistently refused to adhere to its conditions. The City had no choice but to

revoke its CUP in the face of such blatant disregard for the law.

CONCLUSION

Although the City provided U-Haul with a decade's worth of opportunity to comply with its CUP, and the impact of its non-compliance on the surrounding community was clearly communicated to it, it unwaveringly chose to continue, and thereby profit from, its illegal expansion into the neighborhood. On the eve of revocation, it admitted its failures and pledged to *finally* conform, now that the City had its attention. The City rightly deemed these belated efforts lacking in light of the record before it and revoked its CUP.

Rather than comply with this determination, U-Haul sued the City. This determination was then reviewed by the trial court pursuant to the independent judgment standard and was determined to be supported by the weight of evidence in the record. Far from the "death penalty for a business"[15] it claims it suffered from this ruling, and despite its failure to obtain a stay of this ruling, it continued to operate at the Berkeley location and the City was forced to file a separate action to enjoin its operations which the

[15] Petition at 22.

court preliminarily granted. (Alameda County Superior Court Case No. RG0838856.)

Before the Appellate Court, U-Haul raised new due process arguments claiming it had not been provided a fair hearing before the City Council, that it was improperly denied oral argument on the writ and that the trial judge was biased against it. Although the Appellate Court ruled that these arguments had been waived, it rejected each one on a substantive basis as well and found that the trial court's denial of its writ was based upon substantial evidence.

U-Haul continued its challenge in the California Supreme Court arguing that the Appellate Court also erred because it did not apply U-Haul's "heightened due process standard" which apparently requires Appellate Courts to examine and measure "all reasonable alternatives" to revocation, whether or not contained in the Administrative Record, in order to review a trial court's decision upholding a CUP revocation for a failure to comply with its conditions. The California Supreme Court denied U-Haul's petition for review.

Here, U-Haul resorts to interpolating federal case law into a quote by the Appellate Court in order to attempt to manufacture a federal question. It then claims this Court must grant certiorari to resolve an issue that it *recently resolved* and cites to this Court's determination as just one of "the nation's courts'" "myriad of tests." U-Haul further disingenuously alleges to seek redress for the City's failure to

"consider" alternative remedies to "*a complete closure of its truck business.*" (Petition at 24.) (emphasis added.) However, what it terms "consideration" in reality is "adopt[ion]" since the record overwhelmingly demonstrates the City's considered determination. (*Id.* at 23.)

For all the foregoing reasons, the City respectfully prays that this Court deny U-Haul's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A – BERKELEY CITY COUNCIL

RESOLUTION NO. 63,842-N.S.;
DATED OCTOBER 9, 2007

(Bate Stamp Nos. 000514 – 000521
of the Administrative Record, Volume Two)

RESOLUTION NO. 63,842–N.S.

REVOKING AND TERMINATING USE PERMIT NO. 7575 ISSUED TO U-HAUL COMPANY, LOCATED AT 2100 SAN PABLO AVENUE, FOR VIOLATING THE TERMS OF THE USE PERMIT

WHEREAS, the U-Haul Company (hereafter "U-Haul") is a truck and trailer rental business located at 2100 San Pablo Avenue, in Berkeley, California, in the West Berkeley Commercial District of South Berkeley; and

WHEREAS, U-Haul has been in operation since July 1975; and

WHEREAS, U-Haul International, Inc. in Phoenix Arizona owns the property and Jeff Singleton, U-Haul Marketing Company President, and U-Haul Company of West Sacramento operate the business; and

WHEREAS, in May 1975, U-Haul submitted a use permit application and site plan that stated that there would be approximately twenty trucks and thirty trailers stored on the site, the hours of operation would be 8:00 a.m. to 7:00 p.m. and there would be four off-street parking spots on the U-Haul lot; and

WHEREAS, in June 1975, the Zoning Adjustments Board (hereafter "Board") granted U-Haul Use Permit No. 775 based on its application that the use will include approximately twenty trucks and thirty trailers; and

WHEREAS, in September 1975 the City conducted an inspection and determined that U-Haul had constructed a building partially in the right of way. The City ordered U-Haul to submit an application for a revocable encroachment permit, which was granted by City Council Resolution No. 47,702 N.S.; and

WHEREAS, since 1997 U-Haul has repeatedly violated the conditions of Use Permit No. 7575 by greatly exceeding the number of trucks allowed on the property and using the public right of way to store additional vehicles; and

WHEREAS, in September 1997, the Zoning Compliance Officer issued U-Haul a *First Notice and Order to Correct*, in which U-Haul was specially warned that Use Permit No. 7575 allowed staging on the property only and that it was in violation of eight design review conditions placed on Use Permit No.7575. In October 1997, U-Haul submitted a written response to the *First Notice* stating that (a) incoming trucks and trailers would be referred to the new Emeryville dealership when the Berkeley location is full; (b) premiums would be increased on one-way rentals; and (c) customers renting from Berkeley would be referred to other locations for returns; and

WHEREAS, on May 17, 2000, the City received a complaint from a neighborhood resident that U-Haul was using Addison Street, Tenth Street and Allston Way to store its vans. The resident complained to U-Haul and was told by U-Haul it had no room on its lot to store all the vehicles; and

WHEREAS, on June 14, 2000, in response to the May 17, 2000 citizen complaint, Code Enforcement Officer Maurice Norrise contacted U-Haul Assistant Manager Randy Hessler regarding the complaint and on June 16, 2000 issued U-Haul a *Courtesy Follow Up Notice* notifying U-Haul that it was unlawfully using the public right of way to store vehicles; and

WHEREAS, on August 21, 2000 the Code Enforcement Officer issued a criminal citation to Randy Hessler for illegally parking U-Haul trucks in the public right of way; and

WHEREAS, on September 14, 2000, Code Enforcement received a letter from Jim Buell, U-Haul Marketing Company President, stating that U-Haul would comply with its use permit in part, that all trucks parked by customers in the public right of way after hours would be removed by 10:00 a.m. the next day, and that U-Haul would apply for a variance to reduce the number of trailers and increase the number of trucks. However, U-Haul never filed any such application; and

WHEREAS, on August 23, 2004, in response to community complaints, Code Enforcement Officer Roy Phelps contacted Jeff Singleton, the new U-Haul Marketing Company President, regarding U-Haul's violating the conditions of the use permit by parking its trucks in the public right of way; and

WHEREAS, on September 15, 2004, the Code Enforcement Officer Roy Phelps issued a *Notice of Violation* to U-Haul manager Emerson Payumo

because U-Haul continued to park its trucks in the public right of way despite prior warnings; and

WHEREAS, in May 2006, neighbors again complained that U-Haul was parking trucks on the street and blocking driveways. During the period from May 2006 and June 2006, Code Enforcement Officer Roy Phelps monitored U-Haul activity and warned U-Haul Manager Mike Neville that he would be cited if U-Haul continued to park trucks in the public right of way; and

WHEREAS, on June 13, 2006, after repeated inspections and warnings, the Code Enforcement Officer issued a $500 administrative citation (No. 0023) to U-Haul Manager Mike Neville for parking trucks on the public right of way. U-Haul did not appeal administrative citation No. 0023 and the $500 penalty was paid on August 31, 2006; and

WHEREAS, on August 23, 2006, Code Enforcement staff met with Jeff Singleton regarding U-Haul's unlawful practice of parking its trucks on the public right of way, and during this meeting staff pointed out to Mr. Singleton that the site plan posted in U-Haul's office was in violation of Use Permit No. 7575 because it showed U-Haul storing fifty trucks on the lot; and

WHEREAS, at the August 23, 2006 meeting with Mr. Singleton, Code Enforcement staff gave Mr. Singleton a 30-day moratorium on further enforcement action and advised Mr. Singleton to do all the following: (1) submit an application to modify the current use

permit; (2) schedule a meeting with the surrounding residential and commercial neighbors to discuss current and previous community concerns; (3) do not park U-Haul trucks on the public right of way; and (4) reduce the number of trucks on the lot to 20 trucks; and

WHEREAS, on September 21, 2006, Code Enforcement delivered to U-Haul Field Relief Manager Adam Craig a written notice for Mike Neville and Jeff Singleton that advised the City's 30-day moratorium on enforcement would expire on September 23, 2006, warned U-Haul that it must reduce the number of trucks it had on the lot (fifty-one at that time) to no more than twenty trucks, and requested that Mr. Neville or Mr. Singleton contact the Planning Department regarding their use permit violations; and

WHEREAS, on October 5, 2006, Code Enforcement Supervisor Gregory Daniel issued a citation warning letter to Mike Neville and Jeff Singleton in which he chronicled U-Haul's repeated violations of Use Permit No. 7575 and warned that because of U-Haul's history of non-compliance with the use permit that U-Haul would be cited for all violations to the full extent allowed under law; and

WHEREAS, on November 16, 2006, U-Haul submitted by facsimile an application to modify Use Permit No. 7575 which was incomplete as it did not include the requisite fees, applicant statement, site photographs, vicinity map, site plan or the Zoning Use questionnaire and it did not comply with

Planning Department procedures because facsimile applications are not accepted. On December 13, 2006, staff issued U-Haul a letter advising it that the modification application was incomplete and giving it ten days to file a completed application. U-Haul never completed the application; and

WHEREAS, on February 20, 2007, Peter Onken of U-Haul Company of West Sacramento, submitted another application to modify Use Permit No. 7575. Staff again determined that the application was incomplete in that it failed to address at least fourteen substantive issues regarding U-Haul's operation. On March 16, 2007 staff notified U-Haul its application was incomplete. U-Haul never responded nor submitted a revised application; and

WHEREAS, Code Enforcement has issued U-Haul nine separate citations between June 13, 2004 and February 13, 2007 for violations of Berkeley Municipal Code (BMC) 23B.56.010A, which prohibits any use or activity not proposed in the use application and BMC 23B.56.020A.8, which requires a modification for any change that expands, intensifies or substantially changes the use; and

WHEREAS, on August 21, 2006 Code Enforcement issued U-Haul Administrative Citation No. 0046 for violation of BMC Section 23B.56.020.A.8 for parking thirty-two (32) U-Haul trucks in the public right of way. The penalty was $200 per truck for a total citation of $6400. The citation was upheld on appeal to the City's administrative hearing officer, but has

been appealed by U-Haul to the Alameda County Superior Court; and

WHEREAS, on September 25, 2006, Code Enforcement issued U-Haul Administrative Citation No. 0025 for violation of BMC Section 23B.56.020.A.8 for parking twenty-three (23) excess trucks on the U-Haul lot and imposed a penalty of $100 for each excess truck for a total citation of $2,300. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 2, 2006, Code Enforcement issued U-Haul Administrative Citation Nos. 2390 and 0049 for violations of BMC Section 23B.56.020.A.8. Citation No. 2390 was issued to U-Haul for parking two (2) U-Haul trucks in the public right of way. The penalty imposed was $300 for each truck parked in the right of way for a total penalty of $600. Citation No. 0049 was issued to U-Haul for the twenty (20) excess trucks it had parked on the U-Haul lot. The citation imposed a $200 per truck penalty for each truck in excess of the 20 allowed under the use permit, for a total penalty of $4,000. U-Haul failed to appeal either citation and the penalties remain outstanding; and

WHEREAS, on October 11, 2006, Code Enforcement issued Administrative Citation No. 2391 for violations of BMC Sections 23B.56.010.A, 23B. 56.020.A.8, 23B.56.030, and 23B.56.040 for parking 38 excess trucks on the U-Haul lot. The citation imposed a $100 per truck penalty for each truck in excess of the 20

allowed under the use permit, for a total penalty of $15,200. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 11, 2006, Code Enforcement also issued Administrative Citation No. 2392 for violation of BMC Section 23B.56.020.A.8 for parking two (2) U-Haul trucks in the public right of way. The penalty was $200 per truck for a total penalty of $400. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on November 3, 2006 Code Enforcement issued Administrative Citation No. 2651 for parking twenty-seven (27) excess trucks on the U-Haul parking lot. The citation imposed a penalty of $200 for each truck in excess of the 20 allowed under the use permit, for a total penalty of $21,600; and

WHEREAS, on November 15, 2006, U-Haul Marketing President Jeff Singleton filed an appeal of Administrative Citations No. 0046 and 2651. U-Haul argued that citation No. 0046 should be dismissed because the City could not regulate U-Haul's use of the public right of way. U-Haul also argued that citation No. 2651 should be dismissed because Use Permit No. 7575 was vague and unenforceable because the application stated "approximately 20 rental trucks and 30 rental trailers" would be stored on the U-Haul lot. The hearing officer upheld citation No. 0046 but overturned citation No. 2651 on the ground that she found the use permit to be ambiguous and insufficiently detailed; and

WHEREAS, on February 13, 2007, Code Enforcement issued U-Haul Manager Mike Neville Administrative Citation No. 2394 for illegal dumping, under BMC 12.40.080. The penalty was $1,500, which was not appealed by U-Haul and was paid on March 15, 2007; and

WHEREAS, U-Haul appealed to the Alameda County Superior Court the City's Administrative Hearing Officer's decision on citation No. 0046 and has argued that it is not violating Use Permit No. 7575 by expanding its business beyond the property line to the public right of way. Trial is set on this matter for October 15, 2007; and

WHEREAS, on June 28, 2007, based upon U-Haul's numerous violations of Use Permit No. 7575, the Zoning Adjustments Board held a duly noticed meeting as required by BMC Section 23B.60.020 to determine whether to recommend to the City Council whether U-Haul is in violation of Use Permit No. 7575 and if so, the appropriate remedy; and

WHEREAS, no representative of U-Haul attended the Zoning Adjustment Board's hearing, nor did U-Haul submit any written statement; and

WHEREAS, upon conclusion of the hearing the Zoning Adjustments Board adopted Resolution No. 07-02 and recommended that the City Council revoke Use Permit No. 7575; and

WHEREAS, on September 18, 2007, the City Council held a duly noticed public hearing to consider the

recommendation of the Zoning Adjustment Board and any other evidence that the public or concerned parties wished to present; and

WHEREAS, on July 25, 2007, the City Clerk sent to Mike Neville, U-Haul Company Berkeley, Tom Tollison, U-Haul International, Inc., Jeff Singleton, President, U-Haul Marketing Co., and Damien P. Lillis, U-Haul's legal counsel, a letter notifying them of the public hearing, as required by law, and of the procedure that would be followed at the September 18 hearing; and

WHEREAS, Jeremy Frank, U-Haul District Vice President, attended the Council hearing and submitted additional documents. Mr. Frank did not dispute U-Haul's violations of Use Permit No. 7575, and instead specifically acknowledged that the City could regulate U-Haul's use of the public right of way and apologized for U-Haul's violations of Use Permit No. 7575; and

WHEREAS, the City Council has carefully considered all of the evidence before it, including the June 28, 2007 staff report to the Zoning Adjustments Board, the transcript of the June 28, 2007 Zoning Adjustment Board, subsequent written communications, the staff report prepared for the City Council meeting on September 18, 2007 and the testimony and additional documents submitted at the public hearing on September 18, 2007; and

WHEREAS, no evidence was submitted at the Council hearing refuting Code Enforcement's numerous

citations and notices to U-Haul of its violations of Use Permit No. 7575 by parking in excess of 20 trucks on the U-Haul lot and parking U-Haul trucks in the public right of way; and

WHEREAS, on October 8, 2007, after the Council had closed the public hearing, Marco Gonzalez, U-Haul's newly retained counsel submitted a letter with additional documents to Council, arguing that Council should not revoke U-Haul's use permit because 1) it would be an abuse of the Council's discretion; 2) U-Haul is not violating any conditions of the use permit since the City's administrative hearing officer has determined that the use permit was vague as to how many trucks could be parked on the lot and the Council is bound by that decision; 3) U-Haul has not substantially expanded or changed its character; 4) U-Haul is not operating in violation of its use permit; and 5) the use permit conditions are unenforceable under the doctrine of estoppel; and

WHEREAS, not only is Mr. Gonzalez' October 8th letter untimely, even it had been timely, his arguments lack any merit. Significantly, the administrative hearing officer is only empowered to rule on the citation that was before her. In contrast, the Council has the power under the Zoning Ordinance (BMC 23B.56.030) to determine the conditions of the use permit and whether any have been violated. Further, the record before the Council was far more expansive than that presented to the administrative hearing officer. The fact that U-Haul paid taxes is irrelevant to the Council's determination that it

violated the conditions of the use permit. And, there can be no estoppel as the City has never made any representations to U-Haul that its conduct was lawful and has in fact for numerous years placed U-Haul on notice that it is in violation of the conditions of its use permit; and

WHEREAS, the City Council has evaluated the probative value of all of the above evidence, drawn reasonable inferences there from, and considered the credibility of the various witnesses, based on both their observed demeanor at the public hearing before the City Council and the substance of their testimony (e.g., whether it has been consistent over time, is internally consistent, is illogical, etc.); and

WHEREAS, based on its review of the evidence, the City Council finds as follows:

1. The proceedings before the Zoning Adjustment Board and City Council were conducted under the procedures provided by law.

2. The following are conditions of Use Permit No. 7575:

    a. No more than 20 trucks and 30 trailers are allowed on the lot at any time.

    b. No vehicles or equipment shall be staged, stored, repaired or maintained in the public right of way at anytime.

    c. The hours of operation are 8:00 a.m. to 7:00 p.m. daily.

d. Four off-street parking spaces shall be provided for customers at all times.

e. U-Haul shall comply with all Use Permit No. 7575 Design Review Conditions no later than 30 days from issuance of the Council's decision.

3. The permitted use has been substantially expanded or changed in character beyond that set forth in Use Permit No. 7575.

4. The U-Haul business at 2100 San Pablo is and has been operating in violation of Use Permit No. 7575.

5. Since 1997, U-Haul has been placed on notice that parking more than 20 trucks and 30 trailers on the U-Haul lot and using the public right of way to store U-Haul trucks violates Use Permit No. 7575.

6. Despite being advised by Code Enforcement how to apply for a modification of its Use Permit, U-Haul has never followed through and submitted a completed application for modification of Use Permit No. 7575.

7. Code Enforcement issued U-Haul nine citations for violation of Use Permit No. 7575 between the period from June 13, 2004 through February 13, 2007, for total penalties of $52,900.

8. Despite Code Enforcement's attempts during the last ten years to get U-Haul to conduct its business in compliance with Use Permit No. 7575, U-Haul has failed and continues to

conduct its business in violation of Use Permit No. 7575.

9. U-Haul's apology at the September 18, 2007 public hearing does not negate its serious violations of Use Permit No. 7575 and is insufficient in light of the evidence which shows U-Haul's longstanding failure to comply with the use permit.

10. Marco Gonzalez' October 8th letter on behalf of U-Haul is untimely since Council closed the public hearing and the record on September 18, 2007, and for that reason it is not admitted into the record.

11. Even if Mr. Gonzalez' October 8th letter had been submitted timely, the Council finds that pursuant to BMC 23B.56.030, the representations made by U-Haul in its use permit application and the lot drawings were conditions of the use permit that U-Haul violated. As noted previously, in 2000, U-Haul conceded it was subject to these limitations and in 2006 paid a $500 penalty, thereby conceding that this was a condition of the use permit.

12. The Council has independent authority to interpret the Zoning Ordinance and revoke U-Haul's use permit for violations of the use permit pursuant to BMC 23B.060.010 and 23B.060.020, based upon a far more extensive record and its legislative history in interpreting the Zoning Ordinance.

13. The City's administrative hearing officer's April 6, 2007 determination addressed only

the administrative citation and she did not have before her the full administrative record the Council considered at its September 18, 2007 public hearing or any information about the legislative history of the Zoning Ordinance in this respect.

14. The City has made no representations to U-Haul that its conduct was lawful and has for many years specifically placed U-Haul on notice that its conduct was in violation of the use permit.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that U-Haul Company, located at 2100 San Pablo Avenue is hereby declared to be in violation of Use Permit No. 7575 under Berkeley Municipal Code 23B.60.020, and said Use Permit is hereby revoked and its operations are ordered to cease forthwith.

The foregoing Resolution was adopted by the Berkeley City Council on October 9, 2007 by the following vote:

Ayes: Anderson, Capitelli, Maio, Moore, Olds, Spring, Worthington, Wozniak and Bates.

Noes: None.

Absent: None.

/s/ _____
Tom Bates, Mayor

Attest: /s/ _____
Pamyla Means, MMC, City Clerk

Supreme Court, U.S.
FILED
OCT 27 2009
OFFICE OF THE CLERK

No. 09-308

IN THE

Supreme Court of the United States

U-HAUL CO. OF CALIFORNIA,

Petitioner,

v.

CITY OF BERKELEY, CITY COUNCIL OF THE CITY OF BERKELEY, LINDA MAIO, DARRYL MOORE, MAXWELL ANDERSON, DONA SPRING, BETTY OLDS, KRISS WORTHINGTON, AND GORDON WOZNIAK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Edward H. Zeigler, Jr., Arden H. Rathkopf, Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* (2009 ed.) 4

I. U-Haul Has Properly Asserted a Federal Claim

The City is incorrect in its assertion that U-Haul did not raise a federal claim before the California courts. To the contrary, the record shows that U-Haul has consistently made the federal substantive due process claim from the outset of the action.

In U-Haul's initial Petition for Writ of Mandate filed in response to the permit revocation, U-Haul specifically and distinctly alleged substantive due process violations under the Due Process Clause of both the federal and state constitutions: "The revised resolution violates the *Due Process Clause of the state and federal constitutions* by revoking U-Haul's Use Permit without following the appropriate administrative procedures and in violation of U-Haul's *substantive Due Process rights.*" Clerk's Transcript at 6 [emphasis added].

In its brief in support of the Petition, U-Haul cited to two California cases (*Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376 (1994) and *O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151 (1971)), *both* of which discuss the due process standard (in relevant land use / permit revocation contexts) first articulated in *Lawton v. Steele*, 152 U.S. 133 (1894), and *both* of which cite to *Lawton* as the source of the standard. U-Haul made the same argument to the appellate court, using *Korean American* and *O'Hagen* as vehicles for due process analysis under the *Lawton* test. U-Haul did not explicitly or implicitly abandon its federal due process allegations at the appellate level. Utilizing the *Korean American* decision did not mean that U-Haul was confining its

argument to California law; rather, *Korean American* represents an iteration of the much more fundamental *Lawton* test as applied in permit revocation contexts, and is therefore highly applicable to the current action.

This scenario is similar to that in *Taylor v. Illinois*, 484 U.S. 400 (1988), where this Court held that a due process claim was "sufficiently well presented to the state courts to support [the Court's] jurisdiction." The *Taylor* Court found that "although petitioner expressly asserted only a due process violation, his reliance on the Sixth Amendment was clear. He cited and relied upon, *through a quotation from an Illinois Appellate Court decision*, two of our Compulsory Process Cases." *Id.* at 406, n. 9 [emphasis added]. Here, U-Haul has done more – it has explicitly asserted a due process violation under the Due Process Clause of the Constitution *and* cited to relevant cases which articulate the due process standard that U-Haul advocates.

Indeed, the appellate court itself cited *Lawton* in connection with the due process standard in its decision, which devoted several paragraphs to U-Haul's substantive due process argument and the scope of "the protections of due process prior to [a] permit's revocation." Appendix at 16a-18a. This demonstrates that the appellate court understood that *Korean American* was meant to reach the fundamental due process standard of the federal Constitution.

As the Court of Appeal erred regarding the application of the *Lawton* due process standard to permit revocations based on violations of permit conditions, U-Haul petitioned the California Supreme

Court on that issue. In the Petition for Review, U-Haul focused on the very cases that the Court of Appeal used in its analysis of the due process standard, again referring to *Lawton* and *Korean American* and again emphasizing the *Lawton* standard as the appropriate method of review in all permit revocation cases. This consistent position by U-Haul demonstrates that this issue does not arise from "passing invocations of due process," as the City would argue.

Further, as the entire California Supreme Court Petition was centered on this lone issue, it was only natural – and completely appropriate – for U-Haul to expand on its original argument. Indeed, this Court has held (in the context of Supreme Court review of state court decisions) that an enlargement of questions presented in lower courts is permissible: "Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899). *See also Illinois v. Gates*, 462 U.S. 213, 219-220 (1983). "If the question were only an enlargement of the one mentioned in the assignment of errors . . . we should have no hesitation [in permitting] the question to be . . . argued." *Dewey*, 173 U.S. at 197-198. At any rate, U-Haul very explicitly reiterated to the California Supreme Court that its substantive due process claim was federally based.

Ultimately, "no particular form of words is necessary to be sued in order that the federal question may be said to be involved." *Dewey v. City of Des Moines*, 173 U.S. 193, 199 (1899). "In order to be available in this court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right

founded it in some degree upon the constitution or laws or treaties of the United States." *Id.* at 199-200. *See also Picard v. Connor*, 404 U.S. 270, 278 (1971) (the raising of a federal claim does not require "book and verse [citation to] the federal constitution," but rather the "substance" of a federal claim). Here, U-Haul has exceeded this standard by explicitly alleging, in its First Cause of Action in its initial petition for writ of mandate, that its substantive due process rights under the Due Process Clause of the federal Constitution were violated in the permit revocation process and by consistently arguing for the application of the *Lawton* due process standard in its briefs, at every judicial level.

II. The Questions Presented by U-Haul Were Not Settled in *County of Sacramento v. Lewis*

The City is also incorrect in its presumption that *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) is controlling in this case. While it is true that *Lewis* applies a "shocks the conscience" test in a substantive due process context, the case is limited to its facts and is far from the definitive word on the entire body of substantive due process law. Further, academics and commentators still observe, post-*Lewis*, that, with respect to land use, "federal courts differ in their handling of substantive due process claims." Ziegler, Rathkopf, and Rathkopf, *Rathkopf's The Law of Zoning and Planning*, § 3:3 (2009).[1] This observation is borne out by examining the wide scope of substantive due process law and its treatment in the various federal (and state) courts.

1. U-Haul cited to such recent commentary in its Petition for Certiorari. *See* Petition at 17.

In *Lewis*, the Court expressly confined itself to a narrow issue:

> "The issue in this case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. We answer no, and hold that *in such circumstances* only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."

Lewis, 523 U.S. at 836 [emphasis added]. The Court continued by stating that "preserving the constitutional proportions of substantive due process demands an exact analysis of [the] circumstances," indicating that the analysis conducted in *Lewis* did not and could not apply in other contexts.

Other courts concur. "[The *Lewis* Court] made clear that its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims." *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999). "[T]he Supreme Court limited its holding in *Lewis* to the facts of that case." *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365, 372 (9th Cir. 1998).[2] *See also*

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2. *Moreland*, like *Lewis*, involved non-deliberative, quick action by police officers taken in the course of their (Cont'd)

U.S. v. Stein, 495 F.Supp.2d 390, 411 (S.D.N.Y. 2007) ("It is not clear that the Supreme Court still adheres to the *County of Sacramento* framework.") (citing to *Chavez v. Martinez*, 538 U.S. 760 (2003) and several Second Circuit substantive due process cases); *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 533 (2003) ("Neither the Supreme Court nor the Ninth Circuit has clearly defined when executive conduct becomes "arbitrary in the constitutional sense" so as to impose individual § 1983 [substantive due process] liability in the foster care context.").[3] Moreover, the City belies its own argument that *Lewis* has already addressed the issue U-Haul presents here by stating that "this Court rejected the notion that substantive due process analysis must be fixed with rigid parameters in *County of Sacramento*." Opposition at 18.

Despite the City's contention that *Lewis* has provided finality regarding the appropriate substantive due process test, the disparity among the various federal districts that U-Haul discussed through reference to *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) is still present today, post-*Lewis*.

(Cont'd)
peacekeeping duties (*Lewis* involved a high-speed vehicle chase through residential streets, *Moreland* involved police intervention in an ongoing gunfight which threatened dozens of bystanders). In such situations, perhaps a "shock the conscience" test is appropriate. This standard, however, is not appropriate for more calculated, lengthy governmental decisions.

3. This Court itself has suggested that the "shocks the conscience" test is a flawed, subjective one. *See Lewis*, 523 U.S. at 860-862 (Scalia, J., concurring).

For example, *see Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (applying "arbitrary and unreasonable" and "substantial relation to the public health, safety, morals, or general welfare" tests, derived from *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in challenge to a state statute related to ownership of certain types of livestock).[4] *See also Crider v. Bd. of County Commissioners of the County of Boulder*, 246 F.3d 1285, 1289-1290 (10th Cir. 2001) (applying "reasonably conceivable" test where local cities and counties placed private land in "rural preservation zone").

Ultimately, U-Haul's citation to *Lewis* is illustrative of the fact that many different standards of substantive due process analysis – corresponding to the many different contexts in which due process concerns arise – have been promulgated by this nation's courts and that the question of the appropriate standard of analysis in land use – and, more specifically, use permit revocations – has not been settled.

III. Permit Revocations Are Not and Should Not Be Treated Differently Depending on Whether a Revocation is Based on Nuisance Abatement or Conditions Violations

The City's claim that U-Haul cannot support its due process argument with case law determined in the context of nuisance abatement and other "distinct situations" is inaccurate. The City fails to cite a single

4. The Ninth Circuit has also applied this test in land use and zoning cases. *See North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008).

case to support its allegation that "the fundamental natures of nuisance abatement and permit revocation are substantially different" and misstates case law that purportedly provides support for its claim that "courts have properly recognized a distinction between actions involving nuisance abatement and permit revocations." Opposition at 22, 23.[5] Neither federal law nor California law draws such distinctions in the context of challenges to government regulation of property interests.[6]

First, this Court has long recognized the similarities between nuisance law and land use and zoning regulations. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court consulted the law of nuisances "for the helpful aid of its analogies in the process of ascertaining the scope of" permissible land use regulation. *Id.* at 387-88. Thus, as this Court declared,

> "the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract

5. Further, the City's arguments regarding notice might be applicable to discussions of *procedural* due process, but are immaterial to the present issue.

6. The validity of the City's attempt to color U-Haul's case citations as "inapposite" is also blatantly contradicted by its own reliance on a factually distinct case – *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Lewis* has no factual similarities to land use regulation or zoning in general, let alone permit revocation.

> consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality."

Id. at 388. In addition, both nuisance and land use laws find their basis in the state's lawful exercise of its "police power," which "is universally conceded to include everything essential to the public safety, health, and morals . . ." *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

Second, the City's string citations do not provide authority for its attempt to distinguish "nuisance abatement" from "permit revocation." The City relies on *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776 (1948) and several other cases that stand for the proposition that a permit *may* be revoked when its conditions are not followed. U-Haul does not and has never contended that a municipality may never revoke a permit based on conditions violations; rather, U-Haul contends that municipalities are required, per the strictures of due process, to adopt less drastic remedies whenever they can feasibly achieve the same goal – otherwise, property rights are unduly abused. These cases offer nothing to refute this contention. *O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151 (1971), on the other hand, states that

> "*in each instance*, in order to justify the interference with the constitutional right to carry on a lawful business it *must* appear that the interests of the public generally require such interference and that the means are

> reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals."

Id. at 158 [emphasis added]. This rule does not distinguish between nuisance and conditions violations.

IV. The City Did Not Properly Consider Other Remedies

The City's argument that "considerable thought" was given to alternate remedies is also flawed. First, the fact that some of the zoning board members recommended "restating . . . what the Use Permit says" and giving U-Haul "30 days to conform" does not show meaningful consideration of feasible alternate remedies, nor does it show meaningful consideration of the staff report's recommendation to impose specific *additional* conditions on the permit. To the contrary, the *very first* comment during the zoning board's discussion was to move to recommend that the City Council revoke the use permit. Administrative Record at 139. Moreover, when a board member vaguely referred to the staff recommendation, another board member quickly stated "We're not talking about adding additional conditions. Your recommendation is that we revoke this permit . . ." *Id.* at 143. At no time were the *actual* recommendations themselves *mentioned*, let alone considered.[7] This lack of deliberation continued at the subsequent City Council meeting, where the

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7. Indeed, a board member states that "I've only suggested, without knowing the wording, that I would be comfortable with supporting the staff recommendation . . ." This ignorance as to the actual recommendation clearly demonstrates a lack of meaningful consideration.

recommendations again went unmentioned. The California courts also failed to inquire into alternate, less drastic remedies in their review of the City's revocation proceedings.

Second, the City's emphasis on *consideration* of less feasible remedies misses the import of the *Korean American* decision, which states that "Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible." *Korean American*, 23 Cal.App.4th at 391, n. 5. The important point, then, is that the City *should have chosen* a less strict remedy if it was capable of being effective. Mere discussion of any lesser remedy is insufficient. It is by adherence to the *Korean American* standard that the *Lawton* due process principles are properly followed. The record shows that lesser remedies would have been feasible (as determined in the staff report). Further, the decision-making bodies in the City never did demonstrate, with reasonable reference to *actual alternative proposals*, the infeasibility of those (or any other) remedies. Therefore, the City failed to adhere to the standard articulated in *Korean American* and the *Lawton* due process standard.

CONCLUSION

For the foregoing reasons, and as described in U-Haul's opening brief, U-Haul respectfully requests that this Court grant certiorari and resolve the questions presented.

Respectfully submitted,

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